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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1930

No. 678

SMOOT SAND AND GRAVEL CORPORATION, PETITIONER

vs.

WASHINGTON AIRPORT, INCORPORATED

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR CERTIORARI FILED JANUARY 24, 1931
CERTIORARI GRANTED MARCH 2, 1931

(35600)

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1 [Caption omitted.]

In Circuit Court of Arlington County, Virginia

WASHINGTON AIRPORT, INCORPORATED, A CORPORATION, plaintiff vs. SMOOT SAND AND GRAVEL CORPORATION, A CORPORATION, Oscar Thomas, John Doe, James Doe, Richard Roe, and William Roe, defendants	In Equity No. 2815

2 *Petition for injunction*

Filed Oct. 9, 1929

To the honorable HOWARD W. SMITH,
Judge of said Court.

The plaintiff respectfully shows unto the court as follows:

1. The plaintiff, Washington Airport, Incorporated, is a corporation duly organized and existing under the laws of the State of Virginia, and brings this suit in its own right.

2. The defendant Smoot Sand and Gravel Corporation is a corporation duly organized and existing under the laws of the State of Delaware, and is sued herein in its own right. The defendants Oscar Thomas, John Doe, James Doe, Richard Roe, and William Roe are each sued herein in his own right; that the names John Doe, James Doe, Richard Roe, and William Roe are not the right names of said defendants; and that said right names of said defendants are unknown to plaintiff; and plaintiff requests that when the right names of the defendants be discovered that this declaration be amended by inserting said right names herein.

3. The plaintiff is now, and all times since the 25th day of June, 1929, has been, the owner in fee simple and in possession of those certain parcels of land situate in Arlington County, Virginia, being parts of land known as Alexander's Island, and particularly described as follows:

Beginning for the one parcel at a point in a southerly line of the military road leading from the Highway Bridge to Arlington, said point being distant 146.86 feet from the intersection of said southerly line with the westerly line of the Virginia approach to the Highway Bridge, said point being at the northwesterly corner of the line of George D. Horning; thence southwesterly with said
3 southerly line to its intersection with the easterly line of Arlington Reservation; thence easterly and southerly with said reservation to the Rosslyn branch of the Pennsylvania Railroad; thence easterly with said railroad to a small triangular parcel of land belonging to the Pennsylvania Railroad Co.; thence easterly and southerly with the boundaries of said parcel back to said branch railroad; thence with the said branch railroad easterly to its intersection with the westerly line of the Washington, Alex-

andria, and Mt. Vernon Electric Railway; thence northerly with said westerly line of said electric railway to its intersection with the westerly line of the Virginia approach to the Highway Bridge; thence northerly with the westerly line of said highway approach to the southeast corner of the parcel of land sold to Louisa Graul by said trustees May 21, 1923; thence westerly with the Graul southerly line 136.09 feet; thence northeasterly with Graul's rear or westerly line 87.73 feet to the southwesterly corner of the parcel of land sold to George D. Horning by said trustees Nov. 1, 1926; thence with Horning's westerly line northeasterly and northerly to the point of beginning.

The second parcel being a small triangular parcel of land lying between the said electric railway and said highway approach, and described as follows:

Beginning for the same at the intersection of the said electric railway and the westerly line of said highway approach; thence southerly with said highway approach 136 feet, more or less, to the land leased by the said trustees to the Stewart Storage Corporation; thence westerly at a right angle to the said highway approach 51 feet, more or less, to the easterly line of the right of way of said electric railway company; thence northerly with said easterly line of the railway company to the point of beginning.

The third parcel of land, now occupied as an amusement park and leased under the name of Arlington Beach Park, Incorporated, and described as follows:

Beginning for the same at the northerly end of the westerly line of the Virginia approach to the Highway Bridge, as said
4 approach is described in the deed from William M. Lewin, substituted trustees, et al., to the United States of America (recorded in D. B. 111, page 56); thence southerly with the westerly line of said approach to the intersection of the military road to Arlington; thence northwesterly with said military road to the point where it intersects the southeasterly line of the land sold to James G. Nagel by said trustees; thence with the said line of the land sold to Nagel, north 32 degrees 27 minutes, east 528.27 feet, to the low-water mark on Boundary Channel of the Potomac River; thence southerly with the low-water mark of said channel, and of the Potomac River, to the point of beginning.

Said three above-described parcels of land being part of the same property which was conveyed to the said parties of the first part by deed recorded in deed book No. 122, at page 4, of the said land records.

4. That the plaintiff acquired title to said property by deed of conveyance executed on the 25th day of June, 1929, by H. Rozier Dulany and R. Walton Moore, trustees, and recorded on the same day in the land records of Arlington County, Virginia. That said deed of conveyance contains the following provision, to wit:

"The above-described property is conveyed to the said party of the second part, together with all rights, easements, ways, waters, and improvements thereunto appertaining."

A copy of said deed of conveyance is hereunto annexed and made a part hereof, marked "Exhibit A."

5. That a portion of the said property, to wit, that portion described in said deed as "parcel three," is adjacent to the Potomac River immediately opposite the city of Washington, in the District of Columbia, and has a frontage of approximately 1,800 feet along the said Potomac River; that under the provisions of said deed the portion thereof which is contiguous to said river extends to the low-water mark thereof; and the plaintiff is informed as a matter of law, and therefore alleges, that its title extends for the full length of said portion contiguous to said river to the low-water mark of said Potomac River on the southern or Virginia shore thereof; that plaintiff is the owner in fee simple of all land lying between the low-water mark of said Potomac River and the high-water mark of said river which is contiguous to and opposite the high land also owned by plaintiff, said high land being a portion of said "parcel three," as hereinbefore described; that said land owned by plaintiff and lying between said low and high water mark as aforesaid is covered and uncovered by the ordinary flow and ebb of the tide and is hereinafter referred to as "said tide land."

6. That the plaintiff purchased all the said parcels of land, including said tide land, for the purpose of operating an airport and seaplane base thereon, where airplanes, seaplanes, hydroplanes, and other aircraft could land and take off without obstruction, and for the further purpose of a high-grade real-estate development along the water front, including a large hotel or apartment house, or both, a dancing and amusement pavilion; an open-air restaurant affording an unobstructed *veiw* of the water, and the further construction of terraces extending down to the water from which boating, swimming, bathing, and other aquatic amusements may be conducted from properly constructed wharves, piers, or other water-front facilities; and that, for the purpose of carrying out said intentions on the part of the plaintiff, negotiations have been had with operators of hotels, restaurants, and other places of amusement and with architects and engineers, with the general purpose and intention in mind of establishing on said premises structures and facilities of exceptional and distinctive beauty; that since the said purchase plaintiff has continuously operated an airport on said property as a commercial business; that plaintiff paid a large sum of money for said property, to wit, the sum of $675,000, and has spent and is continuing to spend large sums of money in the improvement of the same; that said tide land, being a portion of said property so purchased by plaintiff, is of great value, and in view of the purpose for which plaintiff purchased said tide land and intends to use the same is of peculiar and special value to plaintiff.

7. That the plaintiff derives its revenue principally from the operation of airplanes and the carrying of passengers by airplanes for hire, and in making the large expenditures hereinabove referred to in the purchase of said land plaintiff contemplated and

intended the continued operation of airplanes, as well as seaplanes, in order to produce revenues, and also intended and now intends, unless prevented by the wrongful acts of defendants as hereinafter set forth, to make use of the said tide land for the operation of a seaplane port, and to provide free and unobstructed access from the said property of plaintiff to the main channel of the Potomac River; that in addition to operating said airplanes and seaplanes port as aforesaid, and the other lines of business above mentioned, plaintiff has intended and now intends at some future time to conduct other kinds of business on portions of said property so owned by it, and in connection with the said business, including the operation of said airplane and seaplane port, plaintiff has intended and now intends to build piers, wharves, and docks in said river in front of and adjacent to said tide land owned by plaintiff; that in connection with the business of operating said airplane port and seaplane port, as well as such other business as plaintiff may operate in the future, it is necessary and essential to the successful operation of said various kinds of business that there be free and unobstructed access to said Potomac River and to the wharves, piers, and docks that plaintiff intends to build along the main channel of said river.

8. That the defendants did on or about the 19th day of September, 1929, wrongfully, and without the consent or knowledge of the plaintiff, enter upon the said tide land, being a portion of the property of plaintiff, and by means of a dredging boat or other appliance or appliances proceeded to make excavations upon the said tide land, the property of plaintiff, and to fill certain portions thereof by dumping large quantities of said gravel, rock, refuse, and other materials thereon, and said defendants have at all times since the date last herein mentioned continued said dredging and filling operations, and the plaintiff is informed and believes and therefore alleges that it is the purpose and intention of the defendants so to continue said operations; that as a portion of said operations defendants are now
7 engaged in building a large rock wall on and completely across said tide land, which said wall will completely destroy the value of said tide land for the purpose of a seaplane or hydroplane port; that the construction of said rock wall and said filling with sand, gravel, and other material will cut off plaintiff's access to the said river and to the wharves, piers, and docks intended to be erected by plaintiff, and will destroy the value of said property as a site for hotels, apartment houses, and restaurants by cutting off access to said river and by destroying the free and unobstructed view of said river, which is essential to the successful conduct of said various kinds of business, and will entirely prevent plaintiff from using its said property in the manner intended by plaintiff.

9. Plaintiff further states that even since the acquisition of the above-described property it has leased a portion thereof contiguous to the Potomac River for the purpose of operating an amusement park, pleasure resort, and bathing beach, and that the property, including the said tide land, has been continuously used, at high

tide, for swimming, diving, bathing, boating, and other aquatic sports, and that plaintiff proposes to continue to use the said property, including said tide land, for said purposes, and that the dredging and filling of said land by the defendants as aforesaid and the construction of a rock wall by defendants as aforesaid will completely destroy the value of said tide land for the purposes in this paragraph set forth, and will entirely prevent plaintiff and its lessees from using the same for said purposes.

10. Plaintiff further states that the said unlawful and wrongful acts of defendants, unless restrained by this court, will cause a large portion of said tide lands so belonging to plaintiff, approximately twenty acres thereof, to be fully destroyed or its character entirely changed, and will cause the shore line of said river to be changed, and that plaintiff's access from its said property to the channel of said river will be wholly impeded and cut off by the said dredging, filling, and construction operations of the defendants.

11. Plaintiff states further that unless the defendant is
8 enjoined by a court of equity from its said unlawful and wrongful dredging and filling of, and construction upon, plaintiff's property, the plaintiff will suffer great and irreparable injury and damage for which it will have no adequate remedy at law.

Wherefore, the premises considered, the plaintiff prays as follows:

(a) That proper process issue in this case directed to said defendants requiring each of them to appear and answer this suit.

(b) That an injunction be issued by this honorable court ordering the defendants to remove their property, machinery, and appliances from the said land of the plaintiff, and restraining the said defendants and each of them, their agents, and servants from again entering upon the said property of the plaintiff and from placing machinery and appliances thereon, and from dredging, filling, excavating, constructing, or doing any other act upon or about the land or premises of the plaintiff.

(c) That such retraining orders and/or temporary injunctions herein as may be requisite to preserve the plaintiff's right, or otherwise, be issued, and that on final hearing the same be made permanent.

(d) That such further and other relief herein may be granted to the plaintiff as may seem meet and proper.

WASHINGTON AIRPORT, INCORPORATED,
By HOWARD SUTHERLAND, *President.*

C. BASCOM SLEMP,
LOUIS TITUS,
EDMUND BURKE,
GEORGE V. TRIPLETT, Jr.
WALTER T. MCCARTHY,
Attorneys for Plaintiff.

[*Duly sworn to by Howard Sutherland; jurat omitted in printing.*]

Exhibit A to petition

Recorded 6/25/29.

This deed, made this 25th day of June, 1929, by and between H. Rozier Dulany and R. Walton Moore, surviving trustees, under that certain deed in trust dated December 23rd, 1909, and recorded in deed book No. 122, at page 4, of the land records of Arlington County, Virginia, parties of the first part, and Washington Airport, Incorporated, a corporation organized and existing under the laws of the State of Virginia, party of the second part:

Witnesseth, that for and in consideration of the sum of six hundred seventy-five thousand ($675,000.00) dollars, the said parties of the first part do grant and convey, with special warrant, unto the said party of the second part, all those parcels of land situate in Arlington County, Virginia, and being parts of land known as Alexander's Island, and particularly described as follows:

Beginning for the one parcel at a point in a southerly line of the military road leading from the Highway Bridge to Arlington, said point being distant 146.86 feet from the intersection of said southerly line with the westerly line of the Virginia approach to the Highway Bridge, said point being at the northwesterly corner of the line of George D. Horning; thence southwesterly with said southerly line to its intersection with the easterly line of Arlington Reservation; thence easterly and southerly with said reservation to the Rosslyn branch of the Pennsylvania Railroad; thence easterly with said railroad to a small triangular parcel of land belonging to the Pennsylvania Railroad Co.; thence easterly and southerly with the boundaries of said parcel back to said branch railroad; thence with the said branch railroad easterly to its intersection with the westerly line of said electric railway to its intersection, Vernon Electric Railway; thence northerly with said westerly line of said electric railway to its intersection with the westerly line of the Virginia approach to the Highway Bridge; thence northerly with the westerly line of said highway approach to the southeast corner of the parcel of land sold to Louise Graul by said trustees May 21, 1923; thence westerly with the Graul southerly line 136.09 feet; thence northeasterly with Graul's rear or westerly line 87.73 feet to the southwesterly corner of the parcel of land sold to George D. Horning by said trustees Nov. 1, 1926; thence with Horning's westerly line northeasterly and northerly to the point of beginning.

The second parcel being a small triangular parcel of land lying between the said electric railway and said highway approach, and described as follows:

Beginning for the same at the intersection of the said electric railway and the westerly line of said highway approach; thence southerly with said highway approach 136 feet, more or less, to the land leased by the said trustees to the Stewart Storage Corporation; thence westerly at a right angle to the said highway approach

51 feet, more or less, to the easterly line of the right of way of said electric railway company; thence northerly with said easterly line of the railway company to the point of beginning.

The third parcel of land, now occupied as an amusement park and leased under the name of Arlington Beach Park, Incorporated, and described as follows:

11 Beginning for the same at the northerly end of the westerly line of the Virginia approach to the Highway Bridge, as said approach is described in the deed from William M. Lewin, substituted trustee, et al., to the United States of America (recorded in D. B. 111, page 56); thence southerly with the westerly line of said approach to the intersection of the military road to Arlington; thence northwesterly with said military road to the point where it intersects the southeasterly line of the land sold to James G. Nagel by said trustees; thence with the said line of the land sold to Nagel, north 32 degrees 27 minutes, east 528.27 feet, to the low water on Boundary Channel of the Potomac River; thence southerly with the low-water mark of said channel, and of the Potomac River, to the point of beginning.

Said three above-described parcels of land being part of the same property which was conveyed to the said parties of the first part by deed recorded in deed book No. 122, at page 4, of the said land records.

The above-described property is conveyed to the said party of the second part, together with all the rights, easements, ways, waters, and improvements thereunto appertaining, and particularly those rights reserved unto the said parties of the first part by:

1. A deed to the United States of America, and recorded in deed book No. 127, at page 596, of the land records of said county.

2. A deed to George D. Horning, recorded in deed book No. 138, at page 70, of the said land records.

3. A deed to Abraham Burnstine, recorded in deed book No. 138, at page 72, of the said land records.

4. A deed to Robert B. Swope, recorded in deed book No. 161, at page 142, of the said land records.

5. A deed to the American Oil Company, recorded in deed book No. 240, at page 268, of the land records of said county.

12 Subject, however, to certain leases upon parts of the above property which are now particularly described as:

1. A lease to Robt. E. Funkhouser, dated Oct. 4, 1927, which expires on the 15th day of Oct. 1930.

2. A lease to General Outdoor Sign Co., dated Apr. 6, 1928, which is subject to discontinuance upon 30 days' notice.

3. A lease to Thos. Cusack Co., dated Oct. 1, 1923, which is subject to discontinuance on 30 days' notice.

4. A lease to Lloyd B. Schaeffer, dated Feb. 2, 1925, which expires on the 2d day of Feb. 1935, and assigned by him to Arlington Beach Park, Incorporated.

5. A lease to Thos. G. Walker (assigned to Peter Gleakas), dated April 1, 1925, which expires on the 1st day of April, 1930.

6. Two leases to Robert E. Funkhouser, terminating October 15, 1932.

7. To monthly tenancy of Frank Nelson.

The said parties of the first part covenant that they have done no act to encumber the above-described land, and that they will execute such further assurances of the said land as may be requisite.

Witness the following signatures and seals.

(Signed) H. ROZIER DULANY, [SEAL.]
Surviving Trustee.

(Signed) R. WALTON MOORE, [SEAL.]
Surviving Trustee.

DISTRICT OF COLUMBIA, *to wit:*

I, Robert E. P. Kreiter, a notary public in and for the District of Columbia aforesaid, whose commission expires on the 28th day of October, 1932, do hereby certify that H. Rozier, Dulany, sur-
13 viving trustee, whose name is signed to the foregoing deed, bearing date of the 25th of June, 1929, has acknowledged the same before me in my District of Columbia aforesaid.

Given under my hand and seal this 25th day of June, 1929.

(Signed) ROBERT E. P. KREITER,
Notary Public, D. C.

DISTRICT OF COLUMBIA, *to wit:*

I, Robert E. P. Kreiter, a notary public in and for the District of Columbia aforesaid, whose commission expires on the 28th day of October, 1932, do hereby certify that R. Walton Moore, surviving trustee, whose names is signed to the foregoing deed, bearing date of the 25th day of June, 1929, has acknowledged the same before me in my District of Columbia aforesaid.

Given under my hand and seal this 25th day of June, 1929.

(Signed) ROBERT E. P. KREITER,
Notary Public, D. C.

Executed the within petition for injunction this 9th day of October, 1929, by serving a true copy thereof on W. F. Taylor, mentioned in said suit as Richard Roe, and by serving a true copy thereof on John S. Ward, mentioned in said suit as James Doe, in person, in Arlington County, Virginia, the said Smoot Sand and Gravel Corp., a corporation, Oscar Thomas & John Doe and William Roe not being found in my bailiwick.

Given under my hand this 9th day of October, 1929.

H. B. FIELDS,
Sheriff, Arlington County, Va.

Executed on the 10th day of October, 1929, by delivering a true copy of the within petition, in writing, to each of the following-named defendants in person:

14 William Roe, whose real name is Consie White; John Doe, whose real name is Oscar Peterson; Oscar Thomas; and there

being no statutory agent of the within-mentioned defendant foreign corporation, the within petition was executed on the 10th day of October, 1929, by delivering a true copy thereof to Oscar Peterson, foreman in charge of the work complained of in this cause, and who is an agent of such corporation; all of the aforesaid copies having been delivered at a point in the Potomac River described in the petition in this suit as "tide lands," and above the low-water line situate on the south shore of said river near the end of the Highway Bridge, opposite Washington, District of Columbia, and alleged in said suit to be in Arlington County, Virginia.

Given under my hand this 12th day of October, 1929.

HERBERT T. BAKER,
Constable, Jefferson Magisterial District,
Arlington County, Virginia.

In Circuit Court of Arlington County

[Title omitted.]

Petition for removal

Filed Oct. 21, 1929

The honorable HOWARD W. SMITH,
Judge of said Court.

Your petitioner, Smoot Sand & Gravel Corporation, a corporation duly chartered organized and existing under the laws of the State of Delaware, appearing specially for the sole purpose of presenting this petition for removal and expressly reserving all exceptions and objections which may be had or taken to the jurisdiction of this court, respectfully shows unto your honor as follows:

That it is one of the defendants in this suit, that said suit is of a civil nature, and that the amount in controversy exceeds the sum or value of three thousand dollars ($3,000.00), exclusive of interests and costs.

15 That the controversy herein is between citizens of different States; that is to say, the complainant was at the time of the commencement of this suit and still is a corporation chartered, organized, and existing under the laws of the State of Virginia, and that your petitioner, Smoot Sand & Gravel Corporation, was at the time of the commencement of this suit and still is a chartered, organized, and existing corporation under the laws of the State of Delaware; and that your petitioner desires to remove this cause before trial thereof to the District Court of the United States to the Eastern District of Virginia at Alexandria, Virginia.

That petitioner alone is and has been at all times material to this controversy carrying on said work of dredging, filling, and construction, and that in the prosecution of such work petitioner is acting pursuant to the authority of the United States of America,

contained in a certain written contract between the petitioner and the United States of America, dated September 20, 1929.

Petitioner further shows unto the court that all the machinery, property, and appliances referred to in the bill belong to and are controlled and operated by petitioner alone, and that none of the other defendants herein have any interest in or control over the same.

Petitioner further shows unto the court that said William F. Taylor and John S. Ward, named as defendants in this suit, have no interest in or connection with the work and operations complained of in the bill and have no interest whatsoever in this controversy, but are and at all times material hereto have been inspectors employed by the United States Government.

Petitioner further shows unto the court that Richard Roe, alias Consie White, John Doe, alias Oscar Peterson, and Oscar Thomas, also named as defendants herein, have no real or substantial interest whatever in this controversy and that the joining of them as defendants herein was and is merely a sham or device to prevent petitioner from removing this case to the United States Court and that they were joined as defendants with no real intention by the complainant of prosecuting this suit against them to a conclusion; that said Consie White, Oscar Peterson, and Oscar Thomas are the mere servants or employees of the petitioner, have no interest or control over any of said work or operations, and have no
16 interest in or control over any of the machinery, property, and appliances referred to in the bill, but that all of these three defendants are subject and amenable to the order and direction of the Smoot Sand & Gravel Corporation.

That shortly before this present suit was instituted complainant instituted in this honorable court a suit against Smoot Sand & Gravel Corporation, a Virginia corporation, and complaining of the same alleged trespasses and wrongs and praying for the same relief in the same language, and not until complainant discovered that you petition, and not the Virginia corporation was carrying on said work, did complainant conceive the idea of joining others as defendants, although the facts were identical in each case.

Petition further shows unto the court that a decree against said White, Peterson, and Thomas would in no wise affect this controversy or afford complainant any substantial relief from the alleged trespasses and wrongs of which it complains, and that the entire controversy shown and alleged by the bill could be fully and finally adjudicated between complainant and this petitioner alone without the presence of said William F. Taylor, John S. Ward, Consie White, Oscar Thomas, and Oscar Peterson, or any or either of them.

Your petitioner herewith presents a good and sufficient bond, as provided by the statutes in such cases, that it will within thirty days from this day file in said District Court a certified copy of the record in this suit, and for the payment of all costs which may

be awarded by the said court if the District Court of the United States should hold that this suit was wrongfully or improperly removed thereto.

Petitioner therefore prays that this honorable court proceed no further herein except to make the order of removal as required by law and to accept the said bond presented herewith and direct a transcript of the record herein to be made for said District Court, as provided by law and as in duty bound, your petitioner will ever pray.

SMOOT SAND & GRAVEL CORPORATION,
A Delaware Corporation.
LEWIS E. SMOOT, *President.*
GARDNER L BOOTHE, *Counsel.*

17 [*Duly sworn to by Lewis E. Smoot; jurat omitted in printing.*]

In Circuit Court of Arlington County

[Title omitted.]

Decree ordering cause removed to District Court of United States

Oct. 21, 1929

This day came the defendant, Smoot Sand & Gravel Corporation, a corporation duly organized and existing under the laws of the State of Delaware, and presented its petition and bond in accordance with act of Congress in such cases made and provided for the removal of this suit to the District Court of the United States for the Eastern District of Virginia at Alexandria, Virginia,
18 which said petition was duly verified; and it appearing to the Court form the said petition that said Smoot Sand & Gravel Corporation is a corporation duly chartered, organized, and existing under the laws of the State of Delaware, and that the complainant is a corporation duly chartered, organized, and existing under the laws of the State of Virginia, that this is a suit of civil nature and that the amount in controversy exceeds the sum or value of three thousand dollars ($3,000.00), exclusive of interest and costs, and that as to the said Smooth Sand and Gravel Corporation this is a removable cause, and that the bond tendered by the said petitioner is in accordance with the law, and that written notice of the filing of said petition and bond for removal has been duly given to the complainant prior to the filing of same, it is accordingly adjudged and ordered that this suit be, and the same hereby is, removed to said District Court of the United States for the Eastern District of Virginia at Alexandria, Virginia, and it is further ordered that upon the payment to him of the proper costs the clerk of this court do forthwith, upon the application therefor by petitioner, prepare and deliver to the petitioner a certified copy of the

record in this suit. To the entry of this order the complainant objects.

HOWARD W. SMITH, *Judge.*

[Clerk's certificate to foregoing transcript omitted in printing.]

19 [Judges's certificate to clerk omitted in printing.]
[Clerk's certificate to judge omitted in printing.]

In United States District Court

Defendant's motion to dismiss plaintiff's petition for injunction

Filed November 8th, 1929

Defendant, Smoot Sand & Gravel Corporation, moves to dismiss the bill upon the following grounds:

1. The allegations of the bill show that this court is without any jurisdiction over the subject matter in controversy.

20 2. The bill shows that the land in controversy does not lie within the jurisdiction of this court but does lie in the District of Columbia.

3. The District of Columbia extends to high-water mark on the Virginia side or south side of the Potomac River. The bill alleges that the land claimed by complainant, and on which the operations complained of are being prosecuted, lies between high-water mark and low-water mark on the south side of the Potomac River, and therefore said land is in the District of Columbia and not the property of complainant and is beyond the jurisdiction of this court.

4. The allegations of the bill show that the land in controversy lies in the District of Columbia and is therefore the property of the United States of America.

(Signed) GARDNER L. BOOTHE,
Counsel for Defendants.
L. B. WAY,
PAUL W. KEAR,
Of Counsel.

In United States District Court, Eastern Virginia

WASHINGTON AIRPORT, INC., PLAINTIFF
vs.
SMOOT SAND AND GRAVEL CORPORATION ET ALS., defendants
} In Equity No. 25

Memorandum on motion to dismiss the bill

Filed Jan. 16, 1930

After mature consideration I have reached the conclusion that the bill should be dismissed for lack of jurisdiction.

The decision of the Supreme Court in the case of Morris vs. United States, 174 U. S. 196, conclusively establishes that the original grant to Lord Baltimore covered "the whole bed and soil of the Potomac River, from bank to bank, and from its source to its mouth." This title was not impaired by the compact between Virginia and Maryland in 1785. It "was a regulation of
21 commerce" and "left the question of boundary open to long-continued disputes." Marine Ry. vs. United States, 257 U. S. 47. The arbitration award of 1877 was limited to the boundary between Virginia and Maryland, and was without effect on the District of Columbia, which succeeded to the rights of Maryland, in 1791. "That was an arbitration between the two States and did not purport to affect the boundary of the District." Marine Ry. case, supra, page 64. There is nothing in Maryland vs. West Virginia, 217 U. S. 1, in conflict with this conclusion. In the subsequent opinion, in the same volume at pages 578–579, the Supreme Court said: "In the former hearing, however, and in the decision rendered, the attention of the court was not directed to the question whether the boundary of Maryland should be at high-water mark or at a low-water mark along the southern bank of the Potomac River. As stated in the former opinion, after the State of West Virginia was created, an arbitration was had between the States of Virginia and Maryland, and the Virginia boundary was fixed at low-water mark on the south shore of the Potomac." The opinion proceeds to explain the circumstances under which the agreement of 1877 was reached, namely, that by prescription the State of Virginia and her citizens had acquired the property rights on the shores of the southern bank of the Potomac, with the privilege of extending wharves from the upland to the line of navigability, and the decision giving effect to the agreement made on this basis established the low-water mark on the south shore of the Potomac as the boundary between West Virginia and Maryland. But there is no like right of prescription as against the District, and there is no force as to the suggestion that the arbitration agreement of '77 is binding on the District. On the contrary, the acts of Congress on the subject demonstrate very clearly the claim of the United States to the whole river bed. Marine Ry. case, supra, pages 65 and 66.

What is said above is not to be taken as an expression of opinion as to the right of the plaintiff to damages for the taking of his property, if that should be the effect of the work now in progress. If, as an upland proprietor, he has, under the compact of 1785, the right of access to the navigable portions of the river, and if
22 the effect of the work in progress is to deny him this privilege, a right to compensation may follow, but that question may not be determined, in my opinion, in this court for the reasons stated above.

In United States District Court

WASHINGTON AIRPORT INCORPORATED, PLAINTIFF vs. SMOOT SAND & GRAVEL CORPORATION ET ALS. defendants	In Equity No. 25

Decree dismissing plaintiff's petition for injunction

Entered and filed January 23, 1930

On the 8th day of November, 1929, came complainant, Washington Airport, Incorporated, and defendant, Smoot Sand & Gravel Corporation, by their respective attorneys, and upon motion of complainant, Washington Airport, Incorporated, by its attorneys defendants, William F. Taylor, John S. Ward, Oscar Thomas, Richard Roe, alias Consie White, and John Doe, alias Oscar Peterson, were dismissed as parties to these proceedings.

Thereupon defendant, Smoot Sand & Gravel Corporation, by leave of court, filed its motion to dismiss the bill of complaint upon the grounds set forth in said motion, and this cause then came on to be heard upon said motion to dismiss the bill, which motion was fully argued both orally and by briefs, by counsel for said complainant and the defendant, Smoot Sand & Gravel Corporation, respectively.

And the court having maturely considered said motion to dismiss the bill, doth, for the reasons stated in writing and hereby made a part of the record in this cause, sustain said motion, and it is accordingly adjudged, ordered, and decreed that the bill of complaint be, and the same hereby is, dismissed.

(Signed) D. LAWRENCE GRONER,
United States Judge.

JANUARY 21, 1930.

23 In United States District Court.

Memorandum of clerk re appeal papers

Petition for appeal (filed March 12th, 1930).

Order allowing appeal and fixing amount of appeal bond (entered and filed March 18, 1930).

Appeal bond (filed March 18th, 1930).

Dated: March 17th, 1930.

Penalty: One thousand ($1,000.00) dollars.

Obligors: Washington Airport, Incorporated, and United States Fidelity and Guaranty Company.

Conditioned to pay all costs.

Citation (issued March 17th, 1930).

Legal service accepted by Gardner L. Boothe, counsel for appellee, on March 18th, 1930.

In United States District Court

Assignment of errors

Filed March 12th, 1930

Comes now the plaintiff, prosecuting an appeal to the United States Circuit Court of Appeals for the Fourth Circuit from the decree rendered and entered herein on the 23rd day of January, 1930, and assigns the following errors committed by the court in the above-entitled case, upon which errors the plantiff will rely in the prosecution of said appeal.

24

I

The court erred in holding that it was without jurisdiction of this suit, and in dismissing the plaintiff's petition for injunction, for the reason that the property which is the subject of this suit lies above the low-water line on the southern or Virginia shore of the Potomac River, opposite the District of Columbia, and as a matter of law is within the State of Virginia and the jurisdiction of this court.

II

The court erred in failing to hold as a matter of law that the boundary of the State of Virginia extends to the low-water line on the southern or Virginia shore of the Potomac River, opposite the District of Columbia, for the reason that the said boundary has been so established as a matter of law by compact between Maryland and Virginia in 1785 and by subsequent decisions of the Supreme Court of the United States.

Wherefore plaintiff prays that the said decree herein be reversed, with instructions to the District Court to overrule the said defendants' motion to dismiss plaintiff's petition.

(Signed) C. Bascom Slemp,
(Signed) Louis Titus,
(Signed) Geo. V. Triplett, Jr.
(Signed) Walter T. McCarthy,
Attorneys for Plaintiff.

In United States District Court

Stipulation of counsel as to what shall constitute the record on appeal

Filed April 21st, 1930

It is hereby stipulated between counsel for the respective parties that the record in this case upon appeal shall be and shall consist of the following:

1. Plaintiff's petition for injunction filed in the Circuit Court of Arlington County, Va.

25 2. Petition of defendant, Smoot Sand and Gravel Corporation, for removal of said cause to the District Court of the United States for the Eastern District of Virginia.

3. Decree of the Circuit Court of Arlington County ordering the removal of said cause.

4. Clerk's authentication of transcript.

5. Defendant's motion herein to dismiss plaintiff's petition for injunction.

6. Memorandum for the court granting defendant's motion and dismissing plaintiff's petition.

7. Decree entered herein January 23, 1930, sustaining defendant's motion to dismiss and dismissing plaintiff's petition for injunction.

8. Plaintiff's petition for appeal.

9. Plaintiff's assignment of errors.

10. Court's order allowing appeal and fixing bond.

11. Bond on appeal.

12. Citation on appeal.

13. This stipulation.

14. Clerk's certificate.

(Signed) C. BASCOM SLEMP,
(Signed) LOUIS TITUS,
(Signed) GEO. V. TRIPLETT, Jr.
(Signed) WALTER T. MCCARTHY,
Counsel for Plaintiff.
(Signed) PAUL W. KEAR,
(Signed) LUTHER B. WAY,
Attorneys for Defendant.

26 In United States District Court

Stipulation to prepare transcript of record and print same under rule 23 of the United States Circuit Court of Appeals for the Fourth Circuit.

Filed April 25, 1930

It is hereby stipulated and agreed that the clerk of this court shall make up a transcript of the record in the above-styled cause and transmit the same to the clerk of the United States Circuit Court of Appeals for the Fourth Circuit, at Richmond, Va.,, and that it be printed under the supervision of the clerk of that court, in accordance with rule 23.

(Signed) WALTER T. MCCARTHY,
Counsel for Appellants.
(Signed) PAUL W. KEAR,
(Signed) LUTHER B. WAY,
Counsel for Appellee.

[Clerk's certificate to foregoing transcript omitted in printing.]

27 In United States Circuit Court of Appeals for the Fourth Circuit

No. 3026

WASHINGTON AIRPORT, INCORPORATED, APPELLANT

VERSUS

SMOOT SAND AND GRAVEL CORPORATION, APPELLEE

APPEAL from the District Court of the United States for the Eastern District of Virginia, at Alexandria. In equity

April 25, 1930, the transcript of record is filed and the cause docketed.

Same day, the original petition for appeal, order allowing appeal, bond, and citation are certified up under sec. 7 of rule 14.

Same day, the appearance of C. Bascom Slemp, Louis Titus, and Lucius Q. C. Lamar is entered for the appellant.

April 28, 1930, the appearance of Gardner L. Boothe and Luther B. Way is entered for the appellee.

May 1, 1930, the appearance of Paul W. Kear, U. S. attorney, and Luther B. Way, special assistant to the U. S. attorney, is entered for the appellee.

28 May 2, 1930, the appearance of Thomas W. Phillips is entered for the appellant.

May 8, 1930, twenty-five copies of the printed record are filed.

May 22, 1930, stipulation of counsel as to the time for the filing of the respective briefs is filed.

ARGUMENT OF CAUSE

June 27, 1930 (June term, 1930), cause came on to be heard before Parker and Northcott, circuit judges, and Ernest F. Cochran, district judge, and is argued by counsel and submitted.

In United States Circuit Court of Appeals

Order granting leave to John R. Saunders, attorney general of the State of Virginia, to intervene and file brief as amicus curiæ

Filed and entered June 27, 1930

Upon the application of John R. Saunders, attorney general of the State of Virginia, and the consent of counsel for the respective parties in the above-entitled cause,

Leave is hereby granted John R. Saunders, attorney general of the State of Virginia, on behalf of the Commonwealth of Virginia, to intervene and file a brief as amicus curiæ in the above-entitled

cause, provided said brief is filed within thirty days from this date, and the parties before the court are allowed thirty days thereafter within which to file a brief in reply if they are so advised.

June 27, 1930.

JOHN J. PARKER,
U. S. Circuit Judge, Presiding.

29 In United States Circuit Court of Appeals, Fourth Circuit

No. 3026

WASHINGTON AIRPORT, INCORPORATED, APPELLANT

VERSUS

SMOOT SAND AND GRAVEL CORPORATION, APPELLEE

APPEAL from the District Court of the United States for the Eastern District of Virginia, at Alexandria

Argued June 27, 1930. Decided October 21, 1930

Before PARKER and NORTHCOTT, Circuit Judges, and ERNEST F. COCHRAN, District Judge

Louis Titus (C. Bascom Slemp on brief) for appellant, and Luther B. Way and J. P. Wenchel, special assistants to the United States attorney (Paul W. Kear, U. S. attorney, and Elton L. Marshall, Seth W. Richardson and Gardner L. Boothe on brief), for appellee, and John R. Saunders, attorney general (Edwin H. Gibson and Collins Denny, jr., assistants attorney general on brief), as amicus curiæ on behalf of the Commonwealth of Virginia.

Opinion

Filed October 21, 1930

30 PARKER, Circuit Judge:

This suit was instituted in the court below to enjoin alleged trespasses on land between high and low water mark on the Virginia side of the Potomac River opposite the District of Columbia. The learned district judge, being of opinion that the boundary of Virginia extended only to high water mark, dismissed the bill for lack of jurisdiction; and complainant has appealed. The sole question presented is whether the boundary line between Virginia and the District of Columbia is at high or at low water mark on the Virginia side of the Potomac.

On May 23, 1609, King James I of England granted to the Commonwealth of Virginia a tract of land extending two hundred miles northward from Point Comfort. This, of course, embraced all of

the Potomac River and much territory beyond. In 1632 King Charles I made a grant to Lord Baltimore, including substantially what is now the State of Maryland, the southern boundary of which was described in part as "to the farther bank of said river and following it." In 1688 King James II granted to Lord Culpeper what is now known as the Northern Neck of Virginia, including "the Potomac River and all the islands within the outermost banks thereof."

These conflicting grants led to considerable controversy, which the State of Virginia attempted to settle in her constitution adopted June 29, 1776, wherein she surrendered her claim to the territory of Pennsylvania and Maryland, but asserted her right to the free navigation and use of the Potomac and Pocomoke rivers and to property in the Virginia shores and strands thereof, the particular provision being as follows:

"The territories contained within the charters, erecting the colonies of Maryland, Pennsylvania, North and South Carolina are hereby ceded, released and forever confirmed, to the people of these
31 colonies respectively, with all the rights of property, jurisdiction, and government, and all other rights whatsoever, which might, at any time heretofore, have been claimed by Virginia, except the free navigation and use of the rivers Potomoque and Pokomoke, *with the property of the Virginia shores and strands, bordering on either of said rivers*, and all improvements which have been or shall be made thereon." (Italics ours.)

The Code of Virginia, in accordance with the claim in her constitution, asserts jurisdiction over the Virginia shores and strands of the Potomac (see section 9 of Virginia Code); and it is admitted that these terms include the lands between high and low water mark.

On March 28, 1785, a compact was entered into between commissioners appointed by the States of Maryland and Virginia, for the purpose of settling their rights and the rights of their citizens in the Potomac River and other waters, article 7 thereof being as follows:

"Seventh. *The citizens of each State, respectively, shall have full property in the shores of Potowmack river adjoining their lands*, with all emoluments and advantages thereunto belonging, and the privilege of making and carrying out wharves and other improvements, so as not to obstruct or injure the navigation of the river; but the right of fishing in the river shall be common to, and equally enjoyed by, the citizens of both States: Provided, that such common right be not exercised by the citizens of the one State to the hinderance or disturbance of the fisheries *on the shores of the other State;* and that the citizens of neither State shall have a right to fish with nets or seines *on the shores of the other.*" (Italics ours.)

This compact was entered into after the States of Maryland and Virginia had acquired their independence and before the adoption

of the Federal Constitution or the formation of the District of Columbia. It will be noticed that it recognized the rights of property of the citizens of the respective States in the shores of the
32 river adjoining their lands, and also that it recognized the "shores" of the river as belonging to the respective States and not to the State of Maryland alone. The proviso that the right of fishing should not be exercised by the citizens of one State to the disturbance of the fisheries "on the shores of the other State," and that the citizens of neither State should have a right to fish with nets or seines "on the shores of the other," was a clear recognition of the fact that the shores on the Virginia side of the river were under the jurisdiction of the State of Virginia. It would have been absurd to have confirmed the right of property in the Virginia shores to the citizens of Virginia and at the same time to have reserved to the State of Maryland political jurisdiction over those shores, so that controversies over titles thereto would be justiciable only in Maryland and crimes committed thereon punishable only in Maryland courts. The compact did not settle or purport to settle whether the line of Virginia followed the shore line of the river in case of indentations, bays, etc., or whether it extended from headland to headland, a question which later led to frequent disputes; but it unquestionably did settle the jurisdiction of that State and the rights of its citizens as extending to low-water mark on the river. As said by the Supreme Court in Maryland *v.* West Virginia, 217 U. S. 577, 580:

"The compact of 1785 (see Code of Virginia, v. 1, title 3, ch. 3, sec. 13, p. 16) is set up in this case, and its binding force is preserved in the draft of decrees submitted by counsel for both States. *We agree with the arbitrators in the opinion above expressed, that the privileges therein reserved respectively to the citizens of the two States on the shores of the Potomac are inconsistent with the claim that the Maryland boundary on the south side of the Potomac River shall extend to high-water mark.* There is no evidence that Maryland has claimed any right to make grants on that side of the
33 river, and the privileges reserved to the citizens of the respective States in the compact of 1785 and its subsequent ratifications indicate the intention of each State to maintain riparian rights and privileges to its citizens on their own side of the river." (Italics ours.)

That case, we think, is directly in point. There the line between Maryland and West Virginia was involved. West Virginia was claiming under Virginia, just as the rights of the District of Columbia here arise under grant from Maryland. After the rendition of the first opinion in that case, reported in 217 U. S. 1, a question arose as to whether the boundary of West Virginia extended to high or to low water mark on the Potomac. The Supreme Court held that it extended to low-water mark, basing its decision on the compact of 1785 and using the language which we have quoted above.

The decision of the Supreme Court in the Maryland-West Virginia case was in no sense based upon the arbitration of 1877 between

Maryland and Virginia and could not have been based upon it, as West Virginia was not a part of Virginia at the time of that arbitration and could not have been bound thereby. The Supreme Court did, however, consider the action of the arbitrators as persuasive authority on the question involved; and we think that it is likewise persuasive here, as the arbitrators had before them the very question which we are considering and were lawyers of great ability and distinction, one of them, Mr. Jeremiah S. Black, having been Attorney General of the United States. The Supreme Court quotes with approval the following pertinent passages from their report:

"The evidence is sufficient to show that Virginia, from the earliest period of her history, used the south bank of the Potomac as if the soil to low-water mark had been her own. She did not give this up by her constitution of 1776, when she surrendered other claims within the charter limits of Maryland; but on the contrary, she
34 expressly reserved 'the property of the Virginia shores or strands bordering on either of said rivers (Potomac or Pocomoke), and all improvements which have or will be made thereon.' *By the compact of* 1785, *Maryland assented to this*, and declared that 'the citizens of each State respectively shall have full property on the shores of the Potomac, and adjoining their lands, with all emoluments and advantages thereunto belonging, and the privilege of making and carrying out wharves and other improvements.'

* * * * * * *

"Taking all together, we consider it established that *Virginia has a proprietary right on the south shore to low-water mark*, and appurtenant thereto has a privilege to erect any structures connected with the shore which may be necessary to the full enjoyment of her riparian ownership, and which shall not impede the free navigation or other common use of the river as a public highway.

"*To that extent Virginia has shown her rights on the river so clearly as to make them indisputable.*" (Italics ours.)

While we agree with the learned judge below, that the arbitration of 1877 between Maryland and Virginia was not binding upon the District of Columbia or upon the United States as the sovereign power within the District, the opinion of the arbitrators as to the effect of the compact of 1785 is, of itself, entitled to great respect. As their opinion was adopted by the Supreme Court in the Maryland-West Virginia case, it became authoritative as to the meaning of that document; and there can be no further question that the effect of the compact was to fix the boundary of Virginia at low-water mark on the river.

We come, then, to the question as to whether that boundary opposite the District of Columbia has been changed by subsequent events.

We do not think that it has. In 1791 commissioners were
35 appointed under act of Congress, who selected an area ten miles square to constitute the seat of government of the United States. The area so selected lay along the Potomac, partly in Maryland and partly in Virginia. Acts of both States were passed in that

year under which each ceded to the United States the land embraced within the area which lay within its boundaries. The effect of the act of Virginia was to vest in the United States jurisdiction over the part of the area which belonged to Virginia, i. e., the part of the ten-mile square area on the Virginia side, to low-water mark on the Potomac, as determined by the compact of 1785. By act of July 9, 1849, 9 Stat. 35, Congress passed an act ceding back to Virginia the territory which she had ceded to the United States, the language of the act being as follows:

"All of that portion of the District of Columbia ceded to the United States by the State of Virginia, and all the rights and jurisdiction therewith ceded over the same be, and the same are hereby, ceded and forever relinquished to the State of Virginia, in full and absolute right and jurisdiction as well of soil as of persons residing or to reside thereon."

We do not follow the Court of Appeals of the District of Columbia in its position taken in the case of Evans v. United States, 31 App. D. C. 544, and Herold v. United States, 284 Fed. 927, to the effect that the compact of 1785 was abrogated by the cession of that portion of the District of Columbia originally granted by the State of Virginia and its recession by the United States. On the contrary, we think that the rights of the State of Virginia in the land in question, as determined by the compact of 1785, were ceded to the United States by the act of cession of 1791, and that exactly the same rights were ceded back to the State by the act of 1846. As said by Mr. Justice Holmes in the case of Marine Ry. v. U. S., 257
U. S. 47 at p. 63, "The original state of things was not
36 changed by the grant of Virginia and the regrant by the United States of the part of the District on the Virginia side."

The decisions of the Court of Appeals to which we have referred are based, we think, upon a misconception of the case of Georgetown v. Alexandria Canal Company, 12 Peters 91, upon which the appellee relies. That was a suit instituted to enjoin the construction of an aqueduct over the Potomac River, on the ground that the piers of the aqueduct obstructed the free use of the river secured to the people living on its borders by the compact of 1785 between Virginia and Maryland. The court held that the citizens of the contracting States were not parties to that compact; that its stipulations would have been subject to change by the States which made it; and that when they ceded to Congress the portion of their territory within the District of Columbia lying on both sides of the river Congress could make any provision for building an aqueduct across the river within that territory that the States could have made by joint action if the territory had not been ceded. Nothing is said in the decision as to the effect of the compact as settling the boundary of Virginia at the low-water mark on the Potomac, nor was that question in any way involved. The fact that, by ceding

the District of Columbia to the United States, Maryland and Virginia vested in the Federal Government all rights with respect to the use of the river reserved to themselves and their citizens by the compact of 1785, could have nothing to do with the question as to whether the boundary of the territory ceded by Virginia was fixed by the compact of 1785 at high or at low water mark, or as to whether the act of 1846, ceding the Virginia portion of the District back to Virginia, should be construed as having reference to the same boundary.

The case of Morris v. U. S., 174 U. S. 196, relied upon by the appellee, is not in point. It is true that in that case it was
37 stated that the grant to Lord Baltimore embraced the Potomac River to high-water mark on the Virginia shore; but the question as to whether the Virginia boundary was at high or low water mark, or how that question was affected by the compact of 1785, was not involved in the decision. The heirs of John and James Marshall were claiming lands on the northern, or District of Columbia, side of the river, under the grant of James II to Lord Culpeper, to which we have referred; and the court merely held that Lord Culpeper acquired no rights to the land there in controversy because of the prior grant to Lord Baltimore. Title or jurisdiction on the Virginia side of the river was in no way involved; and it is manifest that the decision could not be authority for the location of the Virginia boundary at high-water mark as distinguished from low-water mark on the Virginia side.

The case of Marine Ry v. U. S., 257 U. S. 47, s. c. (App. D. C.) 265 Fed. 437, involved, not whether the boundary was at the high or at the low water mark, but whether it extended from headland to headland, so as to include within the boundaries of Virginia a strip of made land lying below the low-water mark within a cove or indentation on the Virginia side. The boundary of Virginia was not established as extending from headland to headland until the award of 1878 under the arbitration with the State of Maryland, which, being after the formation of the District of Columbia, did not, of course, affect its boundary. It was accordingly held that the land there in controversy was not within the boundaries of Virginia, as the original boundary of Maryland extended at least to low-water mark on the Virginia side, and that the courts of the District of Columbia had jurisdiction. On this question the court, speaking through Mr. Justice Holmes, said:

"Except an insignificant portion as to which no special defense was made and which it is agreed may be disregarded, this
38 strip lay below low-water mark until it was filled in by the United States in 1910–1912 by dredging from the bottom of the river and depositing the material on the other side of a riprap wall built on the river bed. * * * The question of the jurisdiction of the trial court and that of the merits very nearly coalesce, as the original title, at least, of Maryland and its jurisdiction were founded

upon the same facts, and as the United States succeeded to the rights of Maryland by the grant of the District completed in 1791. That the original title of Maryland extended at least to low-water mark on the Virginia side it now is too late to deny, in view of the decisions in Maryland v. West Virginia, 217 U. S. 1, 45, 46; s. c. ibid 577, 578; and Morris v. United States, 174 U. S. 196. * * * The award (i. e., of 1878) fixed low-water mark on the Virginia side as the boundary, and is only material if at all as suggesting a claim that the low-water line should be drawn from headland to headland and in that way include the indentation or cove where the United States has filled. But we know of no reason for construing the charter to Lord Baltimore as so limited or that to Howsing as importing such a rule."

The soundness of the decision in Maryland v. West Virginia, supra, was nowhere questioned in the opinion in Marine Ry v. U. S., supra. On the contrary, article 7 of the compact of 1785, upon which the decision in the former case was grounded, was referred to as giving "the citizens of each State full property in the shores of the river." And the Court of Appeals of the District, referring to that case in language which is conclusive of the point involved here, said:

"In the recent case of Maryland v. West Virginia, 217 U. S. 577, 30 Sup. Ct. 630, 54 L. Ed. 888, the court, considering the award of 1878, by which the boundary between the States of Maryland and Virginia was fixed at the low-water line on the Virginia shore, *held, in effect, that this line had been established by the compact of 1785.* The United States was not a party to the award of 1878, and her status with respect to the boundary between the District of
39 Columbia and Virginia was not involved. However, as we interpret the opinion, *it holds that the boundary was established at low-water mark by the compact of 1785*, and unless affected by the exercise of political jurisdiction by the United States, it likewise fixes the boundary of the District of Columbia as ceded by Maryland in 1789, four years after the compact, since whatever territory and right to the soil under the Potomac was ceded to the United States by Virginia in 1789 was receded in 1846." (Italics ours.) (265 Fed. at 441.)

Our attention is particularly called by appellee to the following language of the Supreme Court in the Marine Railway case:

"The compact between Virginia and Maryland in 1785 also seems to us to have no bearing upon the case. It says nothing about the boundary in terms. Without going into the history of the compact or reciting it, we only need to remark that it was a regulation of commerce, and while with a view to opening up a route to the West it provided in article 6 that the Potomac should be considered as a common highway for the purposes of navigation and commerce to the citizens of Virginia and Maryland, and in article 7 gave the citizens of each State full property in the shores of the river adjoining their lands and the privilege of carrying out wharves, &c., with a common right to fishing, it left the question of boundary

open to long-continued disputes. It may be laid on one side even if it ever was in force in the District of Columbia, which has been denied on the ground that the compact was abrogated so far as it affected this land by the grant of Virginia and was not revived by the grant of the United States. Evans *v.* United States, 31 App. D. C. 544, 550. See Georgetown *v.* Alexandria Canal Co., 12 Pet. 91."

There is nothing in this, however, which in any way militates against the rule laid down in Maryland *v.* West Virginia holding that the compact of 1785 fixed the Virginia boundary at low-water mark. As said by the Supreme Court, that compact had no
40 bearing on the point involved in the Marine Railway case, for the reason that it merely fixed the boundary at low-water mark and did not determine the disputed question as to the boundary between headland and headland, which was among the long-continued disputes left open by the compact, to which the opinion referred. The query as to whether the compact was ever in force within the district, manifestly refers to those of its provisions which were regulations of commerce and which were before the court in the case of Georgetown *v.* Alexandria Canal Company, supra. We do not understand that this query was intended to draw in question again the point decided in Maryland *v.* West Virginia, that the boundary of Virginia was fixed by the compact at low-water mark. In holding that the boundary of Virginia extended only to high-water mark, and that the court was without jurisdiction of the controversy for that reason, the court below was in error, and the decree dismissing the bill will accordingly be reversed.

Reversed.

41 In United States Circuit Court of Appeals, Fourth Circuit

No. 3026

WASHINGTON AIRPORT, INCORPORATED, APPELLANT

vs.

SMOOT SAND AND GRAVEL CORPORATION, APPELLEE

APPEAL from the District Court of the United States for the Eastern District of Virginia.

Decree

Filed and entered October 24, 1930

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Virginia, and was argued by counsel.

On consideration whereof it is now here ordered, adjudged, and decreed by this court that the decree of the said District Court in

this cause be, and the same is hereby, reversed; and that this cause be, and the same is hereby, remanded to the District Court of the United States for the Eastern District of Virginia, at Alexandria, for further proceedings in accordance with the opinion of the court filed herein.

October 24, 1930.

JOHN J. PARKER,
U. S. Circuit Judge.

42 In United States Circuit Court of Appeals

Memorandum re mandate, etc.

On another day, to wit, November 24, 1930, the mandate of this court in this cause is issued and transmitted to the United States District Court at Alexandria, Virginia, in due form.

Same day, the original petition for appeal, order allowing appeal, and bond are returned to the clerk at Alexandria, Virginia.

[Clerk's certificate to foregoing transcript omitted in printing.]

43 Supreme Court of the United States

Order allowing certiorari

Filed March 2, 1931

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[Indorsement on cover:] File No. 35600. U. S. Circuit Court of Appeals, Fourth Circuit. Term No. 678. Smoot Sand and Gravel Corporation, petitioner, vs. Washington Airport, Incorporated. Petition for a writ of certiorari and exhibit thereto. Filed January 24, 1931. File No. 35600.

U. S. GOVERNMENT PRINTING OFFICE: 1931

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No. 678

In the Supreme Court of the United States

OCTOBER TERM, 1930

SMOOT SAND AND GRAVEL CORPORATION, PETITIONER

v.

WASHINGTON AIRPORT, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF

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In the Supreme Court of the United States

OCTOBER TERM, 1930

No. —

SMOOT SAND AND GRAVEL CORPORATION, PETITIONER

v.

WASHINGTON AIRPORT, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF

PETITION

The Smoot Sand and Gravel Corporation, by its counsel, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fourth Circuit, entered in this cause on October 24, 1930, reversing the judgment of the District Court of the United States for the Eastern District of Virginia.

QUESTION PRESENTED

Whether the boundary line between the Commonwealth of Virginia and the District of Columbia is at high-water mark or low-water mark on the Virginia, or south side, of the Potomac River.

STATEMENT

This suit was instituted by a petition filed in the Circuit Court of Arlington County, Virginia, to enjoin alleged trespasses on property which the respondent claims to own between high and low water mark on the Virginia side of the Potomac River. Because of the interest of the United States in this litigation counsel employed by the United States were associated with counsel for the petitioner in the defense of this suit in the courts below. For the same reason counsel holding official positions in the Department of Justice are now appearing for the petitioner in this proceeding.

The following facts were alleged in the petition:

The respondent is the owner of certain lands in Virginia, including a parcel of land adjacent to the Potomac River, immediately opposite the City of Washington, in the District of Columbia, and extending to low-water mark thereof, and covered and uncovered by the ordinary flow and ebb of the tide. (R. 2–5.) This land, and other lands described in the bill, were purchased by respondent "for the purpose of operating an airport and seaplane base thereon, where airplanes, seaplanes, hydroplanes and other aircraft could land and take off without obstruction," and for the purpose of the development of the real estate along the water front for commercial purposes, etc. (R. 5.) On or about the 19th day of September, 1929, the petitioner wrongfully, and without the consent or knowledge

of the plaintiff, entered upon said tide land and, by means of a dredging boat, or other appliance, proceeded to make excavations thereon, and to fill certain portions thereof by dumping large quantities of gravel, rock, refuse, and other materials, and has so continued to do ever since the date mentioned. (R. 6.) It was alleged that the petitioner's activities would cut off respondent's access to the river and to wharfs, piers, and docks intended to be erected by it, as a result of which the value of the lands would be destroyed and the respondent would be caused to suffer great and irreparable injury, for which it had no adequate remedy at law. (R. 7–8.)

It was prayed that an injunction issue ordering the petitioner to remove its property, machinery, and appliances from the lands of the respondent, and that it, its agents, and servants, be restrained from again entering upon said property, and from placing machinery and appliances thereon, and from dredging, filling, excavating, constructing, or doing any other act upon or about the lands or premises of respondent. (R. 8.)

The petitioner immediately filed a motion to remove the cause to the District Court of the United States for the Eastern District of Virginia upon the grounds of diversity of citizenship. In this motion it alleged "that in the prosecution of such work, petitioner is acting pursuant to the authority of the United States of America, contained in a certain written contract between the petitioner and

the United States of America, dated September 20, 1929." (R. 15.) The cause was duly removed to the United States court. (R. 17.)

The petitioner then filed a motion to dismiss (R. 19) which was sustained by the District Court upon the ground that the property in question was not within the Commonwealth of Virginia, and that, therefore, the United States District Court for the Eastern District of Virginia had no jurisdiction of the action (R. 20–22).

Thereafter the respondent appealed to the United States Circuit Court of Appeals for the Fourth Circuit. (R. 27.) On October 24, 1930, that court entered its decree reversing the District Court, and holding, in effect, that the property in question lying between high and low water mark on the south or Virginia side of the Potomac River was within the limits of the Commonwealth of Virginia, and within the jurisdiction of the United States District Court for the Eastern District of Virginia. (R. 37.)

Following the decision of the Circuit Court of Appeals, and upon the return of the record therein to the United States District Court pursuant to such decision and decree, the District Court on December 12, 1930, allowed the respondent to file a supplemental bill of complaint setting forth that the defendant had, under the work alleged in the original bill, made extensive excavations and fills upon the premises herein involved, and praying

that the petitioner be required to remove the excavations and fills and restore the *status quo*.

SPECIFICATION OF ERRORS

The court erred:

1. In holding that the boundary of the Commonwealth of Virginia extends to and embraces any part of the bed of the Potomac River below high-water mark on the Virginia shore opposite the City of Washington.

2. In holding that the District Court of the United States for the Eastern District of Virginia had jurisdiction of the subject matter of the cause.

3. In holding that by the Seventh Section of the Compact of March 28, 1785, entered into between Commissioners of Maryland and Virginia, the jurisdiction of the Commonwealth of Virginia and the rights of its citizens were settled as extending to low-water mark on the southern shore of the Potomac River.

4. In holding that the Compact of March 28, 1785, ever was or now is in force in the District of Columbia.

5. In holding that the District Court for the Eastern District of Virginia wrongfully dismissed the bill of complaint for lack of jurisdiction.

REASONS FOR GRANTING THE WRIT

1. The question of the location of the boundary between the Commonwealth of Virginia and the District of Columbia has been the subject of con-

tention for many years. The question is of importance to the United States, both in determining the ownership of the real property in question and in settling the question of jurisdiction for police and other purposes along the southern shore of the Potomac River. The United States is interested in many activities in connection with the Potomac River, and particularly in the southern, or Virginia, shore of the river. This suit is of especial interest upon that question for the reason that the petitioner at the time the suit was brought was carrying on the work of construction complained of under a contract entered into with the Secretary of Agriculture, on behalf of the United States, pursuant to the Act of May 23, 1928, c. 719, 45 Stat. 721, entitled "An Act To authorize and direct the survey, construction, and maintenance of a memorial highway to connect Mount Vernon, in the State of Virginia, with the Arlington Memorial Bridge across the Potomac River at Washington."

2. The decision of the Circuit Court of Appeals is in direct conflict with decisions of the Court of Appeals of the District of Columbia in relation to the same matter. In *Evans* v. *United States*, 31 App. D. C. 544, and in *Herald* v. *United States*, 284 Fed. 927, it was held that the boundary line between the District of Columbia and Virginia is at high-water mark on the southern shore of the Potomac River. The same result was reached by

the general term of the Supreme Court of the District of Columbia in *Alexandria Canal Railroad and Bridge Co.* v. *District of Columbia,* 1 Mackey 217.

3. The decision below is also apparently in conflict with the decisions of this Court in *Morris* v. *United States,* 174 U. S. 196, and *Marine Railway Co.* v. *United States,* 257 U. S. 47.

Wherefore, it is respectfully submitted that this petition for a writ of certiorari to review the judgment of the Circuit Court of Appeals of the Fourth Circuit should be granted.

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JANUARY, 1931.

35220—31——2

BRIEF IN SUPPORT OF PETITION

OPINIONS BELOW

The opinion of the Circuit Court of Appeals (R. 28) is reported in 44 F. (2d) 343. The opinion of the District Court for the Eastern District of Virginia (R. 20) is not reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on October 24, 1930. (R. 37.) The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED, STATEMENT, ETC.

The question presented, the specification of errors relied upon, and a statement of the case will be found in the petition.

ARGUMENT

I

BY THE ORIGINAL GRANT TO LORD BALTIMORE, THE BOUNDARY BETWEEN MARYLAND AND VIRGINIA WAS FIXED AT HIGH-WATER MARK ON THE SOUTH SHORE OF THE POTOMAC RIVER

The question presented in this case is whether land between low-water mark and high-water mark on the south shore of the Potomac River is in the

District of Columbia or the Commonwealth of Virginia. The determination of this question depends upon a consideration of various grants and statutes, together with certain decisions of this Court, which have considered closely related problems.

On June 20, 1632, Charles I granted to Cecilius Calvert, Second Baron of Baltimore and First Lord Proprietary of the Province of Maryland, all the territory of that Province. By the terms of that charter (*infra*, pp. 20–21) it was provided that the western boundary of the grant should run south from what is now Pennsylvania towards the Potomac River "unto the further Bank of said River, and following the same on the West and South, unto a certain Place, called Cinquack, situate near the mouth of said River * * *." On September 27, 1688, King James II granted to Lord Culpeper the territory known as the Northern Neck of Virginia.[1] This grant by its terms included all of the Potomac River.

In *Morris* v. *United States*, 174 U. S. 196, this Court considered the effect of these two grants, and said (p. 225)—

> we agree with the conclusion of the court below, that, upon all the evidence, the charter granted to Lord Baltimore, by Charles I in 1632, of the territory known as the Province

[1] The contention that the boundary line in question was in any way affected by a grant made by the Governor of Virginia to one Howsing in 1669 was disposed of by this Court in *Marine Railway Co.* v. *United States*, 257 U. S. 47, 63.

> of Maryland, embraced the Potomac River and the soil under it, and the islands therein, *to high-water mark on the southern or Virginia shore;* that the territory and title thus granted to Lord Baltimore, his heirs and assigns, were never divested by any valid proceedings prior to the Revolution; nor was such grant affected by the subsequent grant to Lord Culpeper. (Italics ours.)

The conclusion that the charter granted to Lord Baltimore carried the boundary of Maryland to high-water mark on the south bank of the Potomac was reaffirmed by this Court in *Maryland* v. *West Virginia,* 217 U. S. 577. There this Court, after referring to an arbitration before Commissioners appointed by Virginia and Maryland in 1877, said (p. 579):

> They reached the conclusion that following the description in the charter of Charles I to Lord Baltimore, the right or south bank of the Potomac River, at high-water mark, was the boundary between Maryland and Virginia. This conclusion is in accordance with the one reached by this court in the *Morris case,* in which case it was declared that the province of Maryland under the charter of Lord Baltimore embraced the Potomac River to high-water mark on the southern, or Virginia shore, * * *.

In 1776 the State of Virginia adopted a constitution confirming the title of the State of Maryland to the land granted by its charter but reserving "the property of the Virginia shores and

strands, bordering on" the Potomac River. Regardless of the interpretation which should be given to this clause, it is clear that Virginia could not enlarge her boundaries by any statements made in her constitution. Even though Maryland had taken no notice of this constitutional provision or of acts of the Virginia assembly, her silence could not be deemed an acquiescence in the claims they implied. But Maryland did not remain silent, for as soon as Virginia by her constitution of 1776 made an open, public declaration of claims to the Potomac River, Maryland at once solemnly repudiated them. See Proceedings of Convention for October 29 and 30, 1776, in Hanson, Laws of Maryland (1787).

Whether the statement in *Morris* v. *United States, supra,* that the grant of Charles I embraced the Potomac River to its high-water mark on the Virginia shore was necessary to the decision of that case or not, there can be no question as to its correctness. The shore of a river to the line of ordinary high-water mark is part of the river. The grant of a river to a State carries the boundary to the normal high-water mark. *Alabama* v. *Georgia,* 23 Howard 505. This is especially true of a tidal river. A shore, overflowed at high tide, is not susceptible of use except as incident to the use of the stream. The title is held subject to the same public uses as the water itself. *Shively* v. *Bowlby,* 152 U. S. 1.

On the other hand, a boundary at low-water mark is inconsistent with that title and dominion over the river which was granted to Maryland. It is because of this inconsistency that international law has recognized the principle that where the ownership of a river is not divided between bordering States by the thread of the stream, but belongs to one of them alone, the ownership extends to the opposite bank as accessory to the use of the stream. Hall, International Law (7th ed.) 125; 1 Moore, International Law Digest, 617.

II

THE COMPACT OF 1785 BETWEEN MARYLAND AND VIRGINIA DID NOT AFFECT THE LOCATION OF THE BOUNDARY LINE

In 1785 the States of Maryland and Virginia entered into a compact in order to determine certain questions which had been in dispute between them. Article 7 of this compact (*infra*, pp. 21–22) provides that—

> The citizens of each state respectively shall have full property in the shores of Patowmack river adjoining their lands * * *.

The court below held (R. 30) that this compact—

> unquestionably did settle the jurisdiction of that State [Virginia] and the rights of its citizens as extending to low water mark on the river * * *

but this Court has expressly decided that the compact of 1785 had no effect upon the boundary line between the two States. In *Marine Railway Co.*

v. *United States*, 257 U. S. 47, *supra*, this Court said (p. 63):

> The compact between Virginia and Maryland in 1785 also seems to us to have no bearing upon the case. It says nothing about the boundary in terms. Without going into the history of the compact or reciting it, we only need to remark that it was a regulation of commerce, and while with a view to opening up a route to the West it provided in Article 6 that the Potomac should be considered as a common highway for the purposes of navigation and commerce to the citizens of Virginia and Maryland, and in Article 7 gave the citizens of each State full property in the shores of the river adjoining their lands and the privilege of carrying out wharves, &c., with a common right of fishing, it left the question of boundary open to long continued disputes.

The court below in its opinion (R. 35–36) attempted to distinguish the language of this Court set forth above on the ground that the *Marine Railway case* involved the question whether the boundary should be drawn from headland to headland and that consequently the language used could not refer to the question whether the boundary should be established at high-water mark or low-water mark. But we do not believe that this Court's language in the *Marine Railway case* can be so limited. It was an essential part of this Court's decision in that case that the Compact of 1785 need not be considered in determining the boundary of the Dis-

trict of Columbia, and that conclusion is equally applicable in the instant case. See also *Morris* v. *United States,* 174 U. S. 196, 224.

The Compact of 1785, so long as it remained in force, merely accorded to Virginia and her citizens rights and privileges in the nature of easements and servitudes in the shore and stream of the Potomac. The privileges accorded to Virginia amounted to no more than a recognition of the servitude in the stream which is generally allowed in favor of the citizens or subjects of a neighboring sovereign. A cession of such privileges does not negative the retention of territorial sovereignty or ownership, nor does it change boundary lines.

The controversy between Virginia and Maryland as to their boundary continued for nearly a century after the Compact of 1785 (*Morris* v. *United States,* 174 U. S. 196, 224; *Marine Railway Co.* v. *United States,* 257 U. S. 47, 64), and was not settled until the award of the arbitrators named by the two States in 1877 and approved by Congress in 1879. Act of March 3, 1879, c. 196, 20 Stat. 481. Indeed, until the award Virginia claimed the entire river. Thus the two contracting States did not regard the Compact of 1785 as having determined the location of their common boundary.

Furthermore, the Compact of 1785 was never in force in the District of Columbia. By the acts of cession from Maryland and Virginia to the United

States, both States surrendered all their rights of property, as well as their entire sovereignty within the territory ceded, including the whole of the river, its bed and its shores. The Compact was made by the States in their sovereign capacities subject at any time to be modified or abrogated by their joint will. *Georgetown* v. *Alexandria Canal Co.*, 12 Peters 91. The Compact necessarily came to an end, so far as the District of Columbia was concerned, when the two contracting parties were united in one. It follows that: "The compact of 1785 never was in force in the District of Columbia." *Evans* v. *United States*, 31 App. D. C. 544, 550. To the same effect is *Herald* v. *United States*, 284 Fed. 927 (Ct. of App. D. C.).

Nor can it be said that the retrocession of part of the District of Columbia to Virginia operated to revive the Compact of 1785. The easements and privileges possessed by Virginia under the Compact were destroyed by the joint cession to the United States. The Act of Retrocession (Act of July 9, 1846, c. 35, 9 Stat. 35) made no mention of the rights which had been granted by the Compact and the merged easements and privileges were in no way revived. It is well recognized as a principle of common law that when dominant and servient estates are united in the same owner the servitude is extinguished and does not again arise upon severance unless it be reimposed by express words.

Caprow v. *Greenway*, 74 Md. 289, 293; *Denton* v. *Leddell*, 23 N. J. Eq. 64, 66; *Rogers* v. *Powers*, 204 Mass. 257, 264. In *Evans* v. *United States*, 31 App. D. C. 544, *supra*, the court said (p. 552):

> The easements and privileges she possessed in the river, under the compact, were destroyed by the cession to the United States, and, having been lost, they could not be revived by the mere reconveyance of the territory ceded, unless expressly recreated in the act of retrocession.

III

THE DECISION OF THIS COURT IN MARYLAND v. WEST VIRGINIA, 217 U. S. 577, DOES NOT SUPPORT THE DECISION OF THE COURT BELOW

The court below invoked the decision of this Court in *Maryland* v. *West Virginia*, 217 U. S. 577, to support the conclusion that the Compact of 1785 created a new interstate boundary line. The question presented in that case related to the boundary line along the Potomac River between the States of Maryland and West Virginia, the dispute at that stage of the proceeding being, as here, between a line at high-water mark and a line at low-water mark. The Court referred to the arbitration in 1877 between Maryland and Virginia, and stated that although the arbitrators reached the conclusion that the boundary of Maryland, as described in the charter of Charles I, was at high-water mark on the south shore (see p. 10, *supra*), they proceeded (p. 579)—

> to establish the boundary between the States in the light of subsequent events, after referring to the effect of long occupation upon the rights of States and nations, and declaring that the length of time that raises a right by prescription in private parties likewise raises such a presumption in favor of States as well as private parties, * * *.

The court then held that the considerations which had influenced the arbitrators to adopt low-water mark as the boundary between Maryland and Virginia applied with equal force to the line between Maryland and West Virginia. It is clear that this case turned upon prescription. The line at low-water mark was the line which the State of Maryland, by long acquiescence, had estopped herself to question. Of course the award itself did not affect the boundary between the District of Columbia and Virginia. *Marine Railway Co.* v. *United States*, 257 U. S. 47, 64; *Herald* v. *United States*, 284 Fed. 927 (Ct. of App., D. C.).

No claim based upon prescription was alleged in the instant case, nor can any be asserted. From 1791 until 1846 all of the territory now in question was in the District of Columbia. No prescriptive right in favor of Virginia could arise during that period, and since that time the United States has consistently laid claim to jurisdiction over the entire bed of the river. As this Court said in *Marine Railway Co.* v. *United States*, 257 U. S. 47, 65, *supra*—

> the Revised Statutes relating to the District of Columbia, June 22, 1874, § 1, describe the District as "including the river Potomac in its course through the District," which imports an assertion by Congress that the title of the United States embraces the whole river bed; and the jurisdiction of the District over the river seems to have been exercised without dispute. For cases that have reached the reports see *Alexandria Canal Railroad & Bridge Co.* v. *District of Columbia*, 1 Mackey, 217, 225, 226. *Smoot* v. *District of Columbia*, 23 App. D. C. 266. *Evans* v. *United States*, 31 App. D. C. 544.

See also the Act of March 3, 1879, c. 196, 20 Stat. 481, 483, by which the United States, in giving its consent to the award between Virginia and Maryland, provided that nothing contained in the award—

> shall be construed to impair or in any manner affect any right of jurisdiction of the United States in and over the islands and waters which form the subject of the said agreement or award.

It consequently follows that *Maryland* v. *West Virginia, supra*, does not support the decision of the court below. *Herald* v. *United States*, 284 Fed. 927 (Ct. of App. D. C.).

CONCLUSION

We believe that the decision below is erroneous. It is in direct conflict with the decisions of the Court of Appeals of the District of Columbia in

Evans v. *United States*, 31 App. D. C. 544, and *Herald* v. *United States*, 284 Fed. 927. For the reasons set forth in the petition the question presented is one of importance in which the United States is vitally interested. We respectfully submit that the petition should be granted.

Respectfully submitted.

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JANUARY, 1931.

APPENDIX

The charter granted by King Charles I to Lord Baltimore,[1] dated June 20, 1632, provided in part as follows:

> III. Know Ye therefore, that We, encouraging with our Royal Favour, the pious and noble purpose of the aforesaid Barons of Baltimore, of our special Grace, certain knowledge, and mere Motion, have Given, Granted and Confirmed, and by this our present Charter, for Us our Heirs, and Successors, do Give, Grant and Confirm, unto the aforesaid Caecilius, now Baron of Baltimore, his Heirs, and Assigns, all that Part of the Peninsula, or Chersonese, lying in the Parts of America, between the Ocean on the East and the Bay of Chesapeake on the West, divided from the Residue thereof by a Right Line drawn from the Promontory, or Head-Land, called Watkin's Point, situate upon the Bay aforesaid, near the river Wigloo, on the West, unto the main Ocean on the East; and between that Boundary on the South, unto that Part of the Bay of Delaware on the North, which lieth under the Fortieth Degree of North Latitude from the Equinoctial, where New England is terminated; And all that Tract of Land within the Metes underwritten (that is to say) pass-

[1] The original charter was in Latin. The translation above is found in 3 Thorpe, Charters and Constitutions, 1677, 1678.

ing from the said Bay, called Delaware Bay, in a right Line, by the Degree aforesaid, unto the true meridian of the first Fountain of the River of Pattowmack, thence verging toward the South, unto the further Bank of the said River, and following the same on the West and South, unto a certain Place, called Cinquack, situate near the mouth of the said River, where it disembogues into the aforesaid Bay of Chesapeake, and thence by the shortest Line unto the aforesaid Promontory or Place, called Watkin's Point; so that the whole tract of land, divided by the Line aforesaid, between the main Ocean and Watkin's Point, unto the Promontory called Cape Charles, and every the Appendages thereof, may entirely remain excepted for ever to Us, our Heirs and Successors.

The compact entered into in 1785 between Maryland and Virginia [2] provided in part as follows:

Sixth, The river Patowmack shall be considered as a common highway for the purpose of navigation and commerce to the citizens of Virginia and Maryland; and of the United States, and to all other persons in amity with the said states trading to or from Virginia or Maryland.

Seventh, The citizens of each state respectively shall have full property in the shores of Patowmack river adjoining their lands, with all emoluments and advantages thereunto belonging, and the privilege of making and carrying out wharves and other improvements, so as not to obstruct or injure the navigation of the river,

[2] The text of the compact may be found in 1 Dorsey, Maryland Laws, 1692–1839, p. 187, and 12 Hening, Virginia Statutes, p. 50.

but the right of fishing in the river shall be common to, and equally enjoyed by the citizens of both states; provided that such common right be not exercised by the citizens of the one state, to the hindrance or disturbance of the fisheries on the shores of the other state, and that the citizens of neither state shall have a right to fish with nets or seans on the shores of the other.

Eighth, All laws and regulations which may be necessary for the preservation of fish, or for the performance of quarantine, in the river Patowmack, or for preserving and keeping open the channel and navigation thereof, or of the river Pocomoke within the limits of Virginia, by preventing the throwing out ballast, or giving any other obstruction thereto, shall be made with the mutual consent and approbation of both states.

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In the Supreme Court of the United States

OCTOBER TERM, 1930

SMOOT SAND & GRAVEL CORPORATION, PETITIONER

v.

WASHINGTON AIRPORT, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

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3 Thorpe, Charters and Constitutions, 1669–1677, 1677–1686 ..... 9, 31–32
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7 Thorpe, Charters and Constitutions, 3812, 1818 13
Virginia Laws, 1874, c. 135, pp. 151–152 23
Washburn, Easements and Servitudes (4th ed.) 683–685 20

In the Supreme Court of the United States

OCTOBER TERM, 1930

No. 678

SMOOT SAND & GRAVEL CORPORATION, PETITIONER

v.

WASHINGTON AIRPORT, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the Circuit Court of Appeals (R. 18) is reported in 44 F. (2d) 343. The opinion of the District Court (R. 12) is not reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on October 24, 1930. (R. 25.) The petition for certiorari was filed January 24, 1931, and was granted March 2, 1931. (R. 26.) The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the boundary line between the Commonwealth of Virginia and the District of Columbia is at high-water mark or low-water mark on the Virginia or south side of the Potomac River.

STATEMENT

This suit was instituted by a petition filed in the Circuit Court of Arlington County, Virginia, to enjoin alleged trespasses on property which the respondent claims to own between high and low water mark on the Virginia side of the Potomac River.

The petition alleged:

The respondent is the owner of certain lands in Virginia, including a parcel of land adjacent to the Potomac River, immediately opposite the City of Washington, in the District of Columbia, and extending to low-water mark thereof, and covered and uncovered by the ordinary flow and ebb of the tide. (R. 1–3.) This land, and other lands described in the bill, were purchased by respondent "for the purpose of operating an airport and seaplane base thereon, where airplanes, seaplanes, hydroplanes, and other aircraft could land and take off without obstruction," and for the purpose of the development of the real estate along the water front for commercial purposes, etc. (R. 3.) On or about the 19th day of September, 1929, the petitioner wrongfully, and without the

consent or knowledge of the plaintiff, entered upon said tideland, and, by means of a dredging boat, or other appliance, proceeded to make excavations thereon, and to fill certain portions thereof by dumping large quantities of gravel, rock, refuse, and other materials, and has so continued to do ever since the date mentioned. (R. 4.) It was alleged that the petitioner's activities would cut off respondent's access to the river and to wharfs, piers, and docks intended to be erected by it, as a result of which the value of the lands would be destroyed and the respondent would be caused to suffer great and irreparable injury, for which it had no adequate remedy at law. (R. 4–5.)

It was prayed that an injunction issue ordering the petitioner to remove its property, machinery, and appliances from the lands of the respondent; and that it, its agents, and servants, be restrained from again entering upon said property, and from placing machinery and appliances thereon, and from dredging, filling, excavating, constructing, or doing any other act upon or about the lands or premises of respondent. (R. 5.)

The petitioner immediately filed a motion to remove the cause to the District Court of the United States for the Eastern District of Virginia upon the ground of diversity of citizenship. In this motion it alleged "that in the prosecution of such work, petitioner is acting pursuant to the authority of the United States of America, contained in a cer-

tain written contract between the petitioner and the United States of America, dated September 20, 1929." (R. 9–10.) The cause was duly removed to the United States court. (R. 11.)

The petitioner then filed a motion to dismiss (R. 12), which was sustained by the District Court upon the ground that the property in question was not within the Commonwealth of Virginia, and that, therefore, the United States District Court for the Eastern District of Virginia had no jurisdiction of the action (R. 12–14.)

Thereafter the respondent appealed to the United States Circuit Court of Appeals for the Fourth Circuit. (R. 17.) On October 24, 1930, that court entered its decree reversing the District Court, and holding, in effect, that the property in question lying between high and low water mark on the south or Virginia side of the Potomac River was within the limits of the Commonwealth of Virginia, and within the jurisdiction of the United States District Court for the Eastern District of Virginia. (R. 25.)

Following the decision of the Circuit Court of Appeals, and upon the return of the record therein to the United States District Court pursuant to such decision and decree, the District Court on December 12, 1930, allowed the respondent to file a supplemental bill of complaint setting forth that the defendant had, under the work alleged in the original bill, made extensive excavations and fills upon the premises herein involved, and praying

that the petitioner be required to remove the excavations and fills and restore the *status quo*.

SPECIFICATION OF ERRORS

The court erred—

1. In holding that the boundary of the Commonwealth of Virginia extends to and embraces any part of the bed of the Potomac River below high-water mark on the Virginia shore opposite the City of Washington.

2. In holding that the District Court of the United States for the Eastern District of Virginia had jurisdiction of the subject matter of the cause.

3. In holding that by the Seventh Section of the Compact of March 28, 1785, entered into between Commissioners of Maryland and Virginia, the jurisdiction of the Commonwealth of Virginia and the rights of its citizens were settled as extending to low-water mark on the southern shore of the Potomac River.

4. In holding that the Compact of March 28, 1785, ever was or now is in force in the District of Columbia.

5. In holding that the District Court for the Eastern District of Virginia wrongfully dismissed the bill of complaint for lack of jurisdiction.

SUMMARY OF ARGUMENT

I

By the original grant of the Province of Maryland to Lord Baltimore the boundary between

Maryland and Virginia was fixed at high-water mark on the south shore of the Potomac River. The effect of the various conflicting grants of the territory comprising Virginia and Maryland was presented to this Court in *Morris* v. *United States,* 174 U. S. 196. This Court there said that the charter granted to Lord Baltimore by Charles I in 1632 "embraced the Potomac River * * * to high-water mark on the southern or Virginia shore." This conclusion was reaffirmed in *Maryland* v. *West Virginia,* 217 U. S. 577.

II

Neither the Virginia Constitution of 1776 nor the Compact of 1785 between Maryland and Virginia affected the location of the boundary line. The Compact of 1785 was a treaty between two sovereign States. It was essentially a regulation of commerce. At most it did no more than create easements or servitudes in the territory of Maryland in favor of the citizens of Virginia. The Compact did not settle the question of boundary. Indeed, the controversy between Virginia and Maryland as to their boundary continued for nearly a century after the Compact of 1785.

This Court in *Marine Railway Co.* v. *United States,* 257 U. S. 47, expressly decided that the Compact of 1785 had no effect upon the boundary line between the two States.

In so far as the Compact of 1785 granted privileges or servitudes to the citizens of Virginia,

we submit that it was never in force in the District of Columbia, and that it does not affect the boundary between the District of Columbia and Virginia. It is a familiar doctrine of the common law that upon the uniting of the dominant and servient estates in the same owner, the servitude is extinguished. Nor was any servitude in favor of Virginia recreated when part of the District was retroceded to Virginia. When servitudes have been extinguished through the uniting of the dominant and servient estates in the same owner, the servitude does not again arise upon severance of the estates unless it be reimposed by express words.

III

The court below relied on the decision of this Court in *Maryland* v. *West Virginia*, 217 U. S. 577. There is language in this opinion which tends to support the conclusion of the court below. But we contend that the language thus used was not necessary to the decision of the case. We submit that the real basis of this Court's decision in *Maryland* v. *West Virginia* was prescription. That case established that the line at low-water mark was the boundary between West Virginia and Maryland because that was the line which the State of Maryland by long acquiescence had estopped herself to question.

But no claim based upon prescription was alleged in the instant case nor can any be asserted. From

1791 until 1846 all of the territory now in question, including both banks of the river and its entire bed, was in the District of Columbia, and since that time the United States has consistently laid claim to jurisdiction over the entire bed of the river. Furthermore, in its decision in *Marine Railway Co.* v. *United States*, 257 U. S. 47, this Court held that the Compact of 1785 did not affect the question of boundary. We submit that the decision in *Maryland* v. *West Virginia* does not support the conclusion reached by the court below.

ARGUMENT

The question presented in this case is whether the District Court for the Eastern District of Virginia has jurisdiction over land between low-water mark and high-water mark on the south shore of the Potomac River. There is some authority to the effect that a court of equity may compel action outside of its territorial jurisdiction. *The Salton Sea Cases*, 172 Fed. 792 (C. C. A. 9th), certiorari denied, 215 U. S. 603; *Vineyard Land & Stock Co.* v. *Twin Falls Salmon River Land & Water Co.*, 245 Fed. 9 (C. C. A. 9th). But no such contention is made here by the respondents, and the decisions of this Court establish the rule that, in the absence of unusual circumstances at least, an equity court may not enjoin or compel action outside of the territory over which it has jurisdiction. *Northern Indiana Railroad Co.* v. *Michigan Central Railroad Co.*, 15

How. 233; *Mississippi & Missouri Railroad Co.* v. *Ward*, 2 Black 485.

The determination of the location of the boundary line here involved depends upon a consideration of various grants and statutes, together with certain decisions of this Court which have considered closely related problems.

I

BY THE ORIGINAL GRANT TO LORD BALTIMORE THE BOUNDARY BETWEEN MARYLAND AND VIRGINIA WAS FIXED AT HIGHWATER MARK ON THE SOUTH SHORE OF THE POTOMAC RIVER

In 1606 King James I granted the first charter of Virginia. This was soon followed by two other charters, the second charter granted in 1609 and the third charter granted in 1611/12.[1] These charters gave Virginia a tract of land extending two hundred miles north from Point Comfort, thus including all of the Potomac River and considerable territory north of the river.

On June 20, 1632, Charles I granted to Cecilius Calvert, Second Baron of Baltimore and First Lord Proprietary of the Province of Maryland, all the territory of that Province.[2] By the terms of

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[1] These charters are printed in 7 Thorpe, Charters and Constitutions, 3783–3810, and in 1 Hening, Virginia Statutes, 57–66, 80–98, 98–110.

[2] The text of this charter may be found in 3 Thorpe, Charters and Constitutions, 1669–1677. A translation of the charter is printed *ibid*, 1677–1686. A translation of the paragraph of the charter which is involved in the present case is set forth in the Appendix, *infra*, pp. 31–32.

that charter it was provided that the western boundary of the grant should run south from what is now Pennsylvania toward the Potomac River "unto the further Bank of said River and following the same on the West and South, unto a certain Place, called Cinquack, situate near the mouth of said River * * *."[3]

On September 27, 1688, King James II granted to Lord Culpeper the territory known as the Northern Neck of Virginia. This grant by its terms included all of the Potomac River.[4]

The controversy arising out of the conflicting provisions of these grants was first presented to this Court in *Morris* v. *United States*, 174 U. S. 196. There the heirs of John and James Marshall, claiming under the grant made in 1688 to Lord Culpeper, sought to establish their ownership of the entire bed of the Potomac River as against the United States which claimed to own the land in question as the successor of Maryland under the grant to Lord Baltimore made in 1632. This Court con-

[3] The original passage of which this quotation is a translation read as follows: "ad ulteriorem dicti Fluminis Ripam et eam sequendo qua Plaga occidentalis ed Meridionalem spectat usque ad Locum quendam appellatum *Cinquack* prope ejusdem Fluminis Ostium scituatum * * *."

[4] The contention that the boundary line in question was in any way affected by a grant made by the Governor of Virginia to one Howsing in 1669 was disposed of by this Court in *Marine Railway Co.* v. *United States*, 257 U. S. 47, 63.

sidered the effect of the two grants, and said (p. 225):

> * * * we agree with the conclusion of the court below, that, upon all the evidence, the charter granted to Lord Baltimore by Charles I, in 1632, of the territory known as the Province of Maryland, embraced the Potomac River and the soil under it, and the islands therein, *to high-water mark on the southern or Virginia shore*; that the territory and title thus granted to Lord Baltimore, his heirs and assigns, were never divested by any valid proceedings prior to the Revolution; nor was such grant affected by the subsequent grant to Lord Culpeper. (Italics ours.)

The conclusion that the charter granted to Lord Baltimore carried the boundary of Maryland to high-water mark on the south bank of the Potomac was reaffirmed by this Court in *Maryland* v. *West Virginia*, 217 U. S. 577. There this Court, after referring to an arbitration before Commissioners appointed by Virginia and Maryland in 1877, said (p. 579):

> They reached the conclusion that following the description in the charter of Charles I to Lord Baltimore, the right or south bank of the Potomac River, at high-water mark, was the boundary between Maryland and Virginia. This conclusion is in accordance with the one reached by this court in the *Morris case*, in which case it was declared

> that the province of Maryland under the charter of Lord Baltimore embraced the Potomac River to high-water mark on the southern, or Virginia shore, * * *.

Whether the statement in *Morris* v. *United States, supra,* that the grant of Charles I embraced the Potomac River to its high-water mark on the Virginia shore was necessary to the decision of that case or not, there can be no question as to its correctness. The shore of a river to the line of ordinary high-water mark is part of the river. The grant of a river to a State carries the boundary to the normal high-water mark. *Alabama* v. *Georgia,* 23 Howard 505. This is especially true of a tidal river. A shore, overflowed at high tide, is not susceptible of use except as incident to the use of the stream. The title is held subject to the same public uses as the water itself. *Shively* v. *Bowlby,* 152 U. S. 1.

On the other hand, [illegible]y at low-water mark is inconsistent with [illegible]itle and dominion over the river which was g[illegible]o Maryland. It is because of this inconsistency that international law has recognized the principle that where the ownership of a river is not divided between bordering States by the thread of the stream, but belongs to one of them alone, the ownership extends to the opposite bank as accessory to the use of the stream. Hall, International Law (7th ed.) 125; 1 Moore, International Law Digest, 617.

II

NEITHER THE VIRGINIA CONSTITUTION OF 1776 NOR THE COMPACT OF 1785 BETWEEN MARYLAND AND VIRGINIA AFFECTED THE LOCATION OF THE BOUNDARY LINE

On June 29, 1776, the Commonwealth of Virginia, through a convention, adopted a constitution in which the territory granted by the Charter of Maryland was confirmed, but with the reservation of "the property of the Virginia shores and strands, bordering" on the Potomac River.[5] Similar provisions have been made in the statutes of Virginia. Regardless of the interpretation which should be given to this clause, it is clear that Virginia could not extend her boundaries by any statements made in her constitution or statutes.[6] Even though Maryland had taken no notice of this constitutional provision or of acts of the Virginia Assembly, her silence could not be deemed an acquiescence in the claims they implied. But Maryland did not remain silent, for as soon as Virginia, by her constitution of 1776, made an open, public declaration of claims to the Potomac River, Maryland at once solemnly repudiated them. See Proceedings of Convention for October 29, 30, 1776, in Hanson, Laws of Maryland (1787).

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[5] The text of this constitution may be found in 7 Thorpe, Charters and Constitutions, 3812, 3818.

[6] As this Court said in *Marine Railway Co.* v. *United States*, 257 U. S. 47, 65: "Maryland and the United States are not called upon to scrutinize the discourse of those in Virginia even if in statutory form."

In 1785 the States of Maryland and Virginia entered into a compact in order to determine certain questions which had been in dispute between them.[1] Article 6 of this Compact provided that the river Potomac should be considered as a common highway of navigation and commerce to the citizens of Virginia and Maryland and of the United States. Article 7 provided that—

> The citizens of each state respectively shall have full property in the shores of Patowmack river adjoining their lands, with all emoluments and advantages thereunto belonging, and the privilege of making and carrying out wharves and other improvements, so as not to obstruct or injure the navigation of the river; * * *.

The court below held (R. 20) that this Compact—

> unquestionably did settle the jurisdiction of that State [Virginia] and the rights of its citizens as extending to low-water mark on the river.

Relying on the effect which it thus gave to the Compact of 1785, the court below concluded that the boundary line between the District of Columbia and Virginia is located, as a result of the Compact, at low-water mark on the south shore of the Poto-

[1] The text of the Compact may be found in 1 Dorsey, Maryland Laws, 1692–1839, p. 187, and 12 Hening, Virginia Statutes, p. 50. For convenience it is set out in the Appendix, *infra*, pp. 32–38.

mac River.[8] We submit that the court erred in this conclusion.

The Compact of 1785 was a treaty between two sovereign States, dealing with the use of the river upon principles of public law. So long as it remained in force, it merely accorded to Virginia and her citizens rights and privileges in the nature of easements and servitudes in the shore and stream of the Potomac. The privileges accorded to Virginia and her citizens amounted to no more than a recognition of the servitude in the stream which is generally allowed in favor of the citizens or subjects of a neighboring sovereign. A cession of such privileges does not negative the retention of territorial sovereignty or ownership, nor does it change boundary lines.

The dominant idea of the Compact was centered upon commerce and navigation, and the privileges accorded in the waters and adjacent shore, it may reasonably be assumed, were but a further means of carrying out that idea. The effect was to permit the use of the shores for the loading and unloading of goods and the building of wharves and such other structures as are related to commerce and navigation. The grant of a servitude in the

[8] The court below, in reaching its conclusion that the Compact of 1785 settled the boundary line, also relied on certain language used by this Court in its opinion in *Maryland* v. *West Virginia*, 217 U. S. 577, 580. The effect of this language is considered in point III of this brief, *infra*, pp. 22–29.

waters and adjacent shore did not in any respect modify the boundary as originally fixed at high-water mark by the charter granted to Lord Baltimore. Commerce was the dominating idea of the Compact. Benefits resulting to individuals were incidental and secondary. The Compact was made by the States in their sovereign capacities. Obviously the term "full property in the shores" as used in the Compact was but a grant of the privilege of the use of the shore so long as the Compact remained in force. It meant nothing more and could have had no effect upon the boundary fixed by the charter.

Indeed, the controversy between Virginia and Maryland as to their boundary continued for nearly a century after the Compact of 1785. *Morris* v. *United States*, 174 U. S. 196, 224; *Marine Railway Co.* v. *United States*, 257 U. S. 47, 64. Finally, in 1874 the legislatures of the two States agreed in the selection of arbitrators to settle the dispute. These arbitrators made their award in 1877, fixing the boundary between Virginia and Maryland at low-water mark.[1] In this connection it is signifi-

[1] The opinion of the arbitrators was transmitted by the Governor of Virginia to the legislature of that State on January 19, 1877, and printed as House Document No. VI (Library of Congress No. F187/B7B65). An edition of the opinion and award was also published in Washington (Library of Congress No. F187/B7B66).

The consent of Congress to this award was given by the Act of March 3, 1879, c. 196, 20 Stat. 481. Of course the award itself did not affect the boundary between the District

cant that until the award of the arbitrators Virginia claimed not only the land to low-water mark, but the entire river, or later, half the river.[10] Thus the two contracting States themselves did not regard the Compact of 1785 as having determined the location of their common boundary. It is a fact of the highest probative value in settling this point that the two States submitted the question of boundary to arbitration. If the question of boundary was left open and undetermined and was not settled until the report of the arbitrators was accepted by the States in 1878, the court below was clearly in error when it concluded that the Compact settled

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of Columbia and Virginia. *Marine Railway Co.* v. *United States*, 257 U. S. 47, 64; *Herald* v. *United States*, 284 Fed. 927 (Ct. of App. D. C.). It is contended in point III of this brief (*infra*, pp. 22–29) that the award of the arbitrators in favor of Virginia was based primarily upon prescription, a factor which is not present in the case now under consideration.

[10] The opinion of the arbitrators contains the following paragraph (appearing on p. 6 of the Washington edition of the opinion and award referred to in footnote 9, *supra*):

"The State of Virginia, through her commissioners and other public authorities, adhered for many years to her claim for a boundary on the left [north] bank of the Potomac. But the gentlemen who represent her before us expressed with great candor their own opinion that a true interpretation of the King's concession would divide the river between the States by a line running in the middle of it. This latter view they urged upon us with all proper earnestness, and it was opposed with equal zeal by the counsel for Maryland, who contended that the whole river was within the limits of the grant to Lord Baltimore."

the jurisdiction of the State of Virginia "and the rights of its citizens as extending to low-water mark."

Furthermore, this Court has expressly decided that the Compact of 1785 had no effect upon the boundary line between the two States. In *Marine Railway Co.* v. *United States*, 257 U. S. 47, *supra*, this Court said (p. 63):

> The compact between Virginia and Maryland in 1785 also seems to us to have no bearing upon the case. It says nothing about the boundary in terms. Without going into the history of the compact or reciting it, we only need to remark that it was a regulation of commerce, and while with a view to opening up a route to the West it provided in Article 6 that the Potomac should be considered as a common highway for the purposes of navigation and commerce to the citizens of Virginia and Maryland, and in Article 7 gave the citizens of each State full property in the shores of the river adjoining their lands and the privilege of carrying out wharves, &c., with a common right of fishing, it left the question of boundary open to long continued disputes.

The court below in its opinion (R. 25) attempted to distinguish the language of this Court set forth above on the ground that the *Marine Railway case* involved the question whether the boundary should be drawn from headland to headland and that consequently the language used could not

refer to the question whether the boundary should be established at high-water mark or low-water mark. But we do not believe that this Court's language in the *Marine Railway case* can be so limited. It was an essential part of the decision in that case that the Compact of 1785 need not be considered in determining the boundary of the District of Columbia, and that conclusion is equally applicable in the instant case. See also *Morris v. United States,* 174 U. S. 196, 224.

In any event, the purpose of the Compact was pointed out. It was a regulation of commerce. Obviously the reason why the Compact had "no bearing upon the case" was that it did not settle the boundary. This is clearly indicated by the fact that the Compact said "nothing about the boundary in terms" and "left the question of boundary open to long continued disputes."

The Compact, not having changed the boundary, whatever rights below high water it may have granted were extinguished in the District of Columbia when the parties to the Compact ceded to the United States the territory originally included in the District of Columbia. By the acts of cession from Maryland and Virginia to the United States, both States surrendered to the United States all their rights of property, as well as their entire sovereignty within the territory ceded, including the whole of the river, its bed,

and its shores.[11] The Compact was made by the States in their sovereign capacities subject at any time to be modified or abrogated by their joint will. *Georgetown* v. *Alexandria Canal Co.*, 12 Peters 91. The Compact necessarily came to an end, so far as the District of Columbia was concerned, when the titles of the two contracting parties were united in one. It is a familiar doctrine of the common law that immediately upon the uniting of dominant and servient estates in the same owner, the servitude is extinguished. Washburn, Easements and Servitudes (4th ed.) 683–685; *Atwater* v. *Bodfish*, 11 Gray (Mass.) 150; *Coleman's Appeal*, 62 Pa. 252, 274; *Wilder* v. *Wheeldon*, 56 Vt. 344. It follows that: "The compact of 1785 never was in force in the District of Columbia." *Evans* v. *United States*, 31 App. D. C. 544, 550. To the same effect is *Herald* v. *United States*, 284 Fed. 927 (Ct. of App. D. C.).

Nor can it be said that the retrocession of part of the District of Columbia to Virginia in 1846 operated to revive the Compact of 1785 or to reestablish the privileges and servitudes granted by the Compact. Whatever easements and privileges Virginia

[11] The cession to the United States was authorized by the Maryland Act of December 23, 1788 (Maryland Laws, 1788, c. 46), and by the Virginia Act of December 3, 1789 (13 Hening, Virginia Statutes, 43). The Maryland cession was confirmed by the Maryland Act of December 19, 1791. (Maryland Laws, 1791, c. 45.)

possessed under the Compact were destroyed by the joint cession to the United States. The act of retrocession (Act of July 9, 1846, c. 35, 9 Stat. 35) made no mention of the rights which had been granted by the Compact [12] and the merged easements and privileges were in no way revived. It is well recognized as a principle of common law that when servitudes are extinguished through the uniting of the dominant and servient estates in the same owner, the servitude does not again arise upon severance of the estates unless it be reimposed by express words. *Morgan* v. *Meuth*, 60 Mich. 238; *Fetters* v. *Humphreys*, 19 N. J. Eq. 471; *Plimpton* v. *Converse*, 42 Vt. 712. In *Evans* v. *United States*, 31 App. D. C. 544, *supra*, the court said (p. 552):

> The easements and privileges she possessed in the river, under the compact, were destroyed by the cession to the United States, and, having been lost, they could not be revived by the mere reconveyance of the territory ceded, unless expressly recreated in the act of retrocession.

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[12] The terms of this statute, so far as they relate to the retrocession of the territory, were that "* * * all of that portion of the District of Columbia ceded to the United States by the State of Virginia, and all the rights and jurisdiction therewith ceded over the same, be, and the same are hereby, ceded and forever relinquished to the State of Virginia, in full and absolute right and jurisdiction, as well of soil as of persons residing or to reside thereon."

III

THE DECISION OF THIS COURT IN MARYLAND v. WEST VIRGINIA, 217 U. S. 577, DOES NOT SUPPORT THE DECISION OF THE COURT BELOW

The court below relied on the decision of this Court in *Maryland* v. *West Virginia*, 217 U. S. 577, to support the conclusion that the Compact of 1785 created a new interstate boundary line. In an earlier decision in that case (*Maryland* v. *West Virginia*, 217 U. S. 1) this Court had determined the land boundary between the two States at the western part of Maryland. It had also dismissed the cross bill of the State of West Virginia, in so far as it asked for a decree fixing the north bank of the Potomac River as her boundary. When the parties came to submit a decree to this Court in accordance with its decision, a dispute arose as to whether the boundary between the two States along the south bank of the river was at low-water mark or at high-water mark.

In its opinion this Court quoted from the award made in 1877 by the arbitrators agreed upon by Maryland and Virginia.[18] In the language thus

[18] In this quotation, appearing at 217 U. S. 579–580, there is a line of stars, indicating the omission of a sentence. We think that the sentence omitted is material, for it shows clearly that the decision of the arbitrators was based on prescription and not on the construction of the compact. The omitted sentence reads, as follows (quoting from p. 16 of the Washington edition of the opinion and award, referred to in note 9, *supra*): "We are not authority for the construction of this compact, because nothing which concerns it is submitted to us; but we can not help being influenced

quoted, the arbitrators apparently adopted the view that the Compact of 1785 taken together with the consistent claims of Virginia operated to fix the boundary between Virginia and Maryland at low-water mark. This Court then said (pp. 580–581):

> We agree with the arbitrators in the opinion above expressed, that the privileges therein reserved respectively to the citizens of the two States on the shores of the Potomac are inconsistent with the claim that the Maryland boundary on the south side of the Potomac River shall extend to high-water mark. There is no evidence that Maryland has claimed any right to make grants on that side of the river, and the privileges reserved to the citizens of the respective States in the Compact of 1785 and its subsequent ratifications indicate the intention of each State to maintain riparian rights and privileges to its citizens on their own side of the river.

The language thus used, we agree, tends to support the conclusion of the court below. But we contend that the language thus used was not necessary to the decision of the Court, and that it was not in

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by our conviction (Chancellor Bland notwithstanding) that it applies to the whole course of the river above the Great Falls as well as below."

The power of the arbitrators as to the Compact of 1785 was expressly limited by the statutes agreeing to the arbitration. Virginia act of March 28, 1874, Va. Laws, 1874, c. 135, pp. 151–152; Maryland act of April 11, 1874, Md. Laws, 1874, c. 247, pp. 363–364.

fact the basis of the decision in that case. We have already argued in point II of this brief (*supra*, pp. 13–21) that the Compact of 1785 did not affect the boundary line.

We submit that the real basis of this Court's decision in *Maryland* v. *West Virginia*, 217 U. S. 577, *supra*, was prescription. In its opinion in that case, this Court referred to the arbitration of 1877 between Maryland and Virginia, and stated that although the arbitrators reached the conclusion that the boundary of Maryland, as described in the Charter of Charles I, was at high-water mark on the south shore,[14] they proceeded (p. 579)—

> to establish the boundary between the States in the light of subsequent events, after referring to the effect of long occupation upon the rights of States and nations, and declaring that the length of time that raises the right by prescription in private parties likewise raises such a presumption in favor of States as well as private parties, * * *.

The Court then held that the considerations which had influenced the arbitrators to adopt low-water mark as the boundary between Maryland and Virginia applied with equal force to the line between Maryland and West Virginia. It is thus made clear that the decision in *Maryland* v. *West Virginia*, *supra*, turned upon the question of prescrip-

[14] This part of the Court's opinion is quoted at pp. 11–12, *supra*.

tion. The line at low-water mark was the line which the State of Maryland by long acquiescence had estopped herself to question.

In considering the decision in *Maryland* v. *West Virginia,* it is important to keep in mind the basis of the arbitrators' award, and the exact issues which were there decided. Prior to the submission of the location of the boundary to arbitration in 1874, the matter had been in dispute for many years.[15] Numerous efforts had been made to settle the question. Finally, in 1870, the States of Maryland and Virginia had appointed Commissioners for the purpose of adjusting the boundary line along the Potomac River and across Chesapeake Bay and the eastern shore. These Commissioners were unable to agree, but they filed reports in which they stated their respective cases and recommended to the legislatures of their States that the dispute be referred to arbitrators. It thus appears that the negotiations of the Commissioners were the imme-

[15] Within ten years after the Compact of 1785 the legislature of Maryland, by resolution, appointed Commissioners "to settle and adjust, by mutual compact between the two governments, the western and southern limits of this state." Resolutions assented to November Session, 1795, in Maryland Laws, 1795. On March 21, 1835, the legislature of Maryland adopted a resolution seeking to have the boundary dispute settled. In the report accompanying this resolution it was stated: "The southern and western boundaries of Maryland have never been adjusted and defined, by compact with Virginia." Resolution No. 99, in Maryland Laws, 1834. Numerous other efforts to adjust the boundary were made by both States.

diate forerunner of the arbitration and that the issues which the Commissioners were unable to settle were the issues which were left to arbitration.

The reports of the Commissioners of Maryland and Virginia were published in 1874 prior to the arbitration. An examination of these reports makes it plain that the only issue with respect to the Potomac River was raised by Virginia's claim of jurisdiction at first over the entire river, and, later, over half the river.[16] Maryland conceded the line at low-water mark on the south shore, so that the issue of low-water mark *vel non* was not really before the arbitrators.

Furthermore, the opinion of the arbitrators makes it apparent that the dominating factor in their decision as to the whole boundary line then in dispute was prescription. In fact, the arbitrators regarded adverse occupation of only twenty years as sufficient to change the interstate boundary.[17]

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[16] See the Report of the Joint Commissioners to Adjust the Boundary Line of the States of Maryland and Virginia, published in Annapolis, in 1874 (Library of Congress No. F187/B7C736), at pp. 1, 6, 19, 53, 54, 56, 60, 140, and Final Report of the Virginia Commissioners on the Maryland and Virginia Boundary, published in Richmond, in 1874 (Library of Congress No. F187/B7V74), at pp. 9–11, 13, 22–25. Extracts from the reports of the Commissioners appear at pp. 80–81, 108 of the record filed in *Marine Railway Co.* v. *United States*, No. 45, October Term, 1921. See also the statement in the opinion of the arbitrators quoted in note 10, on p. 17, *supra*.

[17] Thus the arbitrators stated as a basis of their decision (quoted from p. 27 of the Washington edition of the opinion

But no claim based upon prescription was alleged in the instant case, nor can any be asserted. From 1791 until 1846 all of the territory now in question was in the District of Columbia. No prescriptive right in favor of Virginia could arise during that period, and since that time the United States has consistently laid claim to jurisdiction over the entire bed of the river. In *Alexandria Canal, Railroad & Bridge Co.* v. *District of Columbia,* 1 Mackey 217, decided in 1881, it was held that the District of Columbia might tax property located between high-water mark and low-water mark on the south shore of the river. In *Smoot* v. *District of Columbia,* 23 App. D. C. 266, decided in 1904, it was held that the District of Columbia might require a license for a dredge operating in the Potomac opposite Georgetown between high and low water mark. In *Evans* v. *United States,* 31 App. D. C. 534, decided in 1908, the defendant was held properly convicted of fishing within the District of Columbia when he stood on land in Virginia and dipped a net into the water between the high-water mark and the low-water mark in the Potomac. A similar result was reached in *Herald* v. *United*

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and award referred to in note 9, *supra*): "Wherever one State has gone over the Charter line taking territory which originally belonged to the other and kept it, without let or hindrance, for more than twenty years, the boundary must now be run so as to include such territory within the State that has it."

States, 284 Fed. 927 (Ct. of App. D. C.), decided in 1922.[18]

In its opinion in *Marine Railway Co.* v. *United States*, 257 U. S. 47, this Court pointed out that the jurisdiction of the District apparently has been "exercised without dispute." This Court said (pp. 65–66)—

> the Revised Statutes relating to the District of Columbia, June 22, 1874, § 1, describe the District as " including the river Potomac in its course through the District," which imports an assertion by Congress that the title of the United States embraces the whole river bed; and the jurisdiction of the District over the river seems to have been exercised without dispute. For cases that have reached the reports see *Alexandria Canal Railroad & Bridge Co.* v. *District of Columbia*, 1 Mackey, 217, 225, 226. *Smoot* v. *District of Columbia*, 23 App. D. C. 266. *Evans* v. *United States*, 31 App. D. C. 544.

See also the Act of March 3, 1879, c. 196, 20 Stat. 481, 483, by which the United States, in giving its consent to the award between Virginia and Maryland, provided that nothing contained in the award—

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[18] Numerous other instances of arrests by officers of the District of Columbia for fishing above low-water mark in the Potomac River, and for other offenses, are referred to at pp. 86–88 of the Record filed in *Marine Railway Co.* v. *United States*, No. 45, October Term, 1921. These arrests took place between 1901 and 1915.

> shall be construed to impair or in any manner affect any right of jurisdiction of the United States in and over the highways and waters which form the subject of the said agreement or award."

We submit that the decision of this Court in *Maryland* v. *West Virginia, supra,* was based upon the award of the arbitrators made in 1877, and upon the effect given to prescription in that award. See *Herald* v. *United States,* 284 Fed. 927, 928 (Ct. of App. D. C.). The prescription relied on in that case is not present in the instant case, and we consequently contend that the actual decision in *Maryland* v. *West Virginia* is not applicable here. Futhermore, we submit that the language used by this Court in its opinion in that case regarding the effect of the Compact of 1785 was not necessary to the decision of that case and should not be followed in the instant case. That this is the proper interpretation of this Court's decision in *Maryland* v. *West Virginia* is, we submit, further indicated by the decision in *Marine Railway Co.* v. *United States,* 257 U. S. 47, where this Court said (p. 63):

> The compact between Virginia and Maryland in 1785 also seems to us to have no bearing upon the case.

CONCLUSION

The judgment of the Circuit Court of Appeals is erroneous and should be reversed.

The petitioner in this case is a private corporation, but the question at issue is one in which the United States is vitally concerned. It is a matter of common knowledge that the Government has now in progress and in prospect extensive projects for the utilization and beautification of the land between low and high water mark similar in character and location to the lands involved in this suit. For this reason the contention that these lands do not lie within the District of Columbia and the exclusive jurisdiction of the United States presents a question of controlling interest to the Government in connection with the development of these projects. For these reasons the petitioner, whose activities here questioned were carried on pursuant to a contract with the United States, has been represented in the courts below, and is here represented, by counsel who are attorneys for the United States.

Respectfully submitted.

THOMAS D. THACHER,
SETH W. RICHARDSON,
G. A. IVERSON,
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ERWIN N. GRISWOLD,
Attorneys for Smoot Sand & Gravel Corporation.

MARCH, 1931.

APPENDIX

CHARTER OF MARYLAND

The charter granted by King Charles I to Lord Baltimore,[1] dated June 20, 1632, provided in part as follows:

> III. Know Ye therefore, that We, encouraging with our Royal Favour, the pious and noble purpose of the aforesaid Barons of Baltimore, of our special Grace, certain knowledge, and mere Motion, have Given, Granted and confirmed, and by this our present Charter, for Us our Heirs, and Successors, do Give, Grant and Confirm, unto the aforesaid Caecilius, now Baron of Baltimore, his Heirs, and Assigns, all that Part of the Peninsula, or Chersonese, lying in the Parts of America, between the Ocean on the East and the Bay of Chesapeake on the West, divided from the Residue thereof by a Right Line drawn from the Promontory, or Head-Land, called Watkin's Point, situate upon the Bay aforesaid, near the river Wigloo, on the West, unto the main Ocean on the East; and between that Boundary on the South, unto that Part of the Bay of Delaware on the North, which lieth under the Fortieth Degree of North Latitude from the Equinoctial, where New England is terminated; And all that Tract of Land within the Metes underwritten (that is to say) passing from the said

[1] The original charter was in Latin. Its text is given in 3 Thorpe, Charters and Constitutions, 1669–1677. The translation above is found in *ibid.* 1677, 1678.

Bay, called Delaware Bay, in a right Line, by the Degree aforesaid, unto the true meridian of the first Fountain of the River of Pattowmack, thence verging toward the South, unto the further Bank of the said River, and following the same on the West and South, unto a certain Place, called Cinquack, situate near the mouth of the said River, where it disembogues into the aforesaid Bay of Chesapeake, and thence by the shortest Line unto the aforesaid Promontory or Place, called Watkin's Point; so that the whole tract of land, divided by the Line aforesaid, between the main Ocean and Watkin's Point, unto the Promontory called Cape Charles, and every the Appendages thereof, may entirely remain excepted for ever to Us, our Heirs and Successors.

THE COMPACT OF 1785

The compact entered into in 1785 between Maryland and Virginia[2] was as follows:

First. The commonwealth of Virginia disclaims all right to impose any toll, duty, or charge, prohibition or restraint, on any vessel whatever sailing through the capes of Chesapeake bay to the state of Maryland, or from the said state through the said capes outward bound; and agrees that the waters of Chesapeake bay, and the river Pocomoke, within the limits of Virginia, be forever considered as a common highway, free for the use and navigation of any vessel belonging to the said state of Maryland, or any of

[2] The text of the compact is given in 1 Dorsey, Maryland Laws, 1692–1839, p. 187, and 12 Hening, Virginia Statutes, p. 50.

its citizens, or carrying on any commerce to or from the said state, or with any of its citizens; and that every such vessel inward or outward bound, may freely enter any of the rivers within the commonwealth of Virginia as a harbour, or for safety against an enemy, without the payment of port duties, or any other charge; and also, that the before mentioned parts of Chesapeake bay, and Pocomoke river, be free for the navigation of vessels from one part of the state of Maryland to another.

Second. The state of Maryland agrees that any vessel belonging to the commonwealth of Virginia, or any of its citizens, or carrying on commerce to or from the said commonwealth, or with any of its citizens, may freely enter any of the rivers of the said state of Maryland as a harbour, or for safety against an enemy, without the payment of any port duty, or other charge.

Third. Vessels of war, the property of either state, shall not be subject to the payment of any port duty or other charge.

Fourth. Vessels not exceeding forty feet keel, nor fifty tons burthen, the property of any citizen of Virginia or Maryland, or of citizens of both states, trading from one state to the other only, and having on board only the produce of the said states, may enter and trade in any part of either state, with a permit from the naval-officer of the district from which such vessel departs with her cargo, and shall be subject to no port charges.

Fifth. All merchant vessels (except such as are described in the fourth article) navigating the river Potowmack, shall enter and clear at some naval office on the said river, in one or both states, according to the laws of the state in which the entry shall be made.

And where any vessel shall make an entry in both states, such vessel shall be subject to tonnage in each state only in proportion to the commodities carried to, or taken from, such state.

Sixth. The river Potomack shall be considered as a common highway, for the purpose of navigation and commerce to the citizens of Virginia, and Maryland, and of the United States, and to all other persons in amity with the said states, trading to or from Virginia or Maryland.

Seventh. The citizens of each state, respectively, shall have full property in the shores of Potowmack river adjoining their lands, with all emoluments and advantages thereunto belonging, and the privilege of making and carrying out wharves and other improvements, so as not to obstruct or injure the navigation of the river; but the right of fishing in the river shall be common to, and equally enjoyed by, the citizens of both states: *Provided,* That such common right be not exercised by the citizens of the one state, to the hindrance or disturbance of the fisheries on the shores of the other state; and that the citizens of neither state shall have a right to fish with nets or seines on the shores of the other.

Eighth. All laws and regulations which may be necessary for the preservation of fish, or for the performance of quarantine, in the river Potowmack, or for preserving and keeping open the channel and navigation thereof, or of the river Pocomoke, within the limits of Virginia, by preventing the throwing out ballast, or giving any other obstruction thereto, shall be made with the mutual consent and approbation of both states.

Ninth. Lighthouses, beacons, buoys, or other necessary signals, shall be erected, fixed and maintained upon Chesapeake bay, between the sea and the mouths of the rivers Potowmack and Pocomoke, and upon the river Potowmack, at the expense of both states. If upon Potowmack river, at the joint and equal charge of both states; and if upon the before mentioned part of Chesapeake bay, Virginia shall defray five parts, and Maryland three parts of such expense; and if this proportion shall in future times be found unequal, the same shall be corrected. And for ascertaining the proper places, mode, and plans for erecting and fixing lighthouses, buoys, beacons and other signals, as aforesaid, both states shall upon the application of either to the other, appoint an equal number of commissioners, not less than three nor more than five from each state, to meet at such times and places as the said commissioners or a major part of them, shall judge fit, to fix upon the proper places, mode, and plans for erecting and fixing such lighthouses, beacons, or other signals, and report the same, with an estimate of the expense, to the legislatures of both states, for their approbation.

Tenth. All piracies, crimes, or offences committed on that part of Chesapeake bay which lies within the limits of Virginia, or that part of the said bay where the line of division from the south point of Potowmack river (now called Smith's Point) to Watkins's Point, near the mouth of Pocomoke river, may be doubtful; and on that part of Pocomoke river, within the limits of Virginia, or where the line of division between the two states upon the said river, is doubtful, by any persons not citizens of the com-

monwealth of Virginia, against the citizens of Maryland, shall be tried in the court of the state of Maryland which hath legal cognizance of such offence. And all piracies, crimes, and offences committed on the before mentioned parts of Chesapeake bay and Pocomoke river, by any persons not citizens of Maryland, against any citizen of Virginia, shall be tried in the court of the commonwealth of Virginia which hath legal cognizance of such offence. All piracies, crimes, and offences committed on the said parts of Chesapeake bay and Pocomoke river, by persons not citizens of either state, against persons not citizens of either state, shall be tried in the court of the commonwealth of Virginia having legal cognizance of such offences: And all piracies, crimes, and offences committed on the said parts of Chesapeake bay and Pocomoke River, by any citizen of the commonwealth of Virginia, or of the state of Maryland, either against the other, shall be tried in the court of that state of which the offender is a citizen. The jurisdiction of each state over the river Potowmack, shall be exercised in the same manner as is prescribed for the before mentioned parts of Chesapeake bay and Pocomoke river, in every respect, except in the case of piracies, crimes, and offences committed by persons not citizens of either state, upon persons not citizens of either state, in which case the offenders shall be tried by the court of the state to which they shall first be brought. And if the inhabitants of either state shall commit any violence, injury, or trespass, to or upon the property or lands of the other, adjacent to the said bay or rivers, or to any person upon such lands, upon proof of due notice to the offender to appear and answer,

any court of record, or civil magistrate of the state where the offence shall have been committed, having jurisdiction thereof, may enter the appearance of such person, and proceed to trial and judgment, in the same manner, as if legal process had been served on such offender; and such judgment shall be valid and effectual against the person and property of such offender, both in the state where the offence shall have been committed, and also in the state where the said offender may reside, and execution may be issued by the court, or magistrate, giving such judgment, in the same manner as upon judgments given in other cases; or upon a transcript of such judgment, properly authenticated, being produced to any court; or magistrate, of the state where such offender may reside, having jurisdiction within the state, or county where the offender may reside, in cases of a similar nature, such court, or magistrate, shall order execution to issue upon such authenticated judgment in the same manner, and to the same extent, as if the judgment had been given by the court, or magistrate, to which such transcript shall be exhibited.

Eleventh. Any vessel entering into any port on the river Potowmack, may be libelled, or attached for debt, by process from the state in which such vessel entered. And if the commercial regulations of either state shall be violated by any person carrying on commerce in Potowmack or Pocomoke rivers, the vessel owned or commanded by the person so offending, and the property on board, may be seized, by process from the state whose laws are offended, in order for trial. And if any person shall fly from justice, in a civil or criminal case, or shall at-

tempt to defraud creditors by removing his property, such person, or any property so removed, may be taken on any part of Chesapeake bay, or the rivers aforesaid, by process of the state from which such person shall fly, or property be removed; and process from the state of Virginia may be served on any part of the said rivers, upon any person or property of any person not a citizen of Maryland, indebted to any citizen of Virginia, or charged with injury having been by him committed; and process from the state of Maryland may be served on any part of the said rivers, upon any person, or property of any person, not a citizen of Virginia, indebted to a citizen of Maryland, or charged with injury by him committed. And in all cases of trial in pursuance of the jurisdiction settled by this compact, citizens of either state shall attend as witnesses in the other, upon a summons from any court, or magistrate, having jurisdiction, being served by a proper officer of the county where such citizen shall reside.

Twelfth. The citizens of either state having lands in the other, shall have full liberty to transport to their own state, the produce of such lands, or to remove their effects, free from any duty, tax, or charge whatsoever, for the liberty to remove such produce or effects.

Thirteenth. These articles shall be laid before the legislatures of Virginia and Maryland and, their approbation being obtained, shall be confirmed and ratified by a law of each state, never to be repealed, or altered, by either, without the consent of the other.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1930.

No. 678.

SMOOT SAND AND GRAVEL CORPORATION, *Petitioner*,

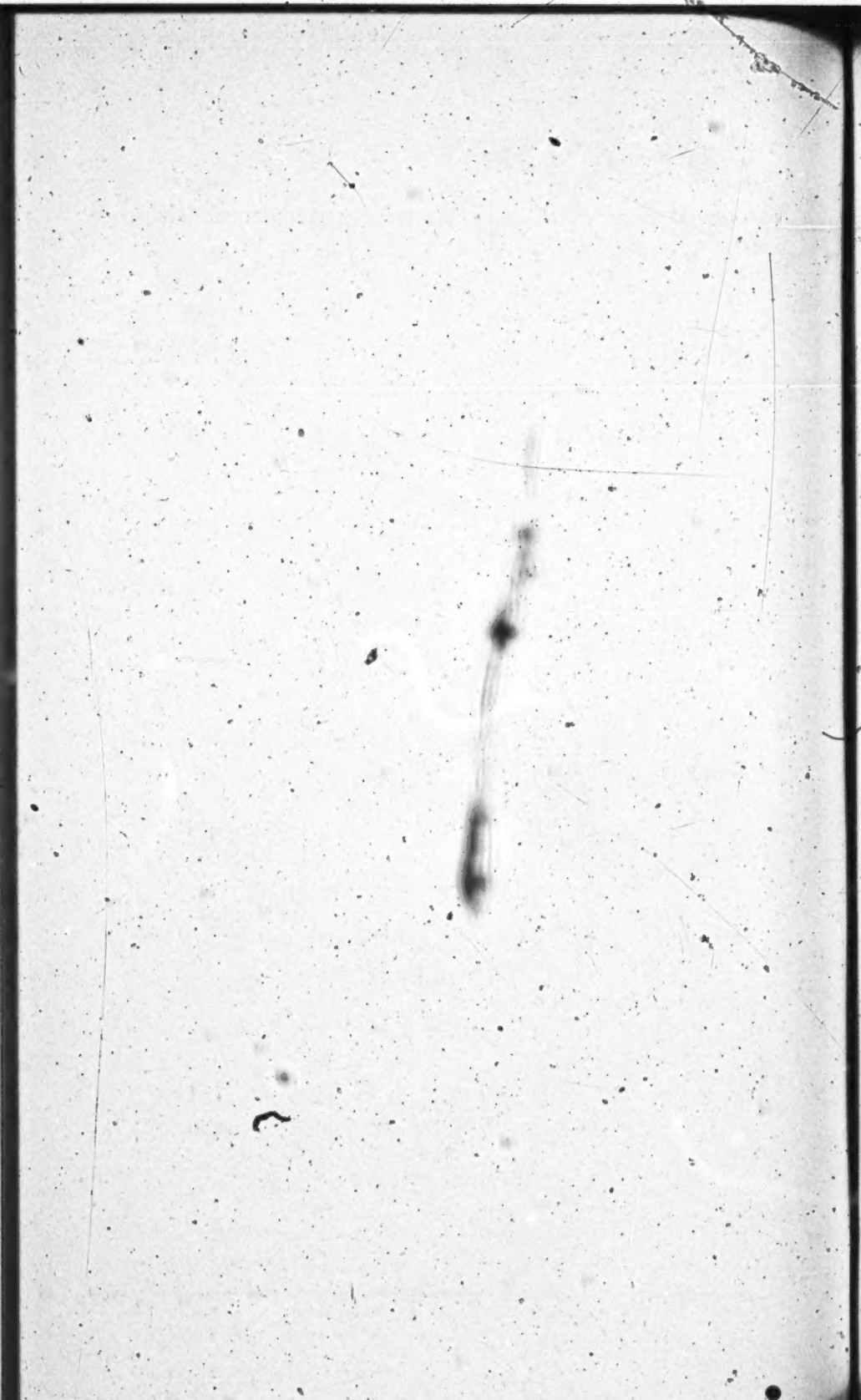
vs.

WASHINGTON AIRPORT, INCORPORATED, *Respondent*.

MOTION OF RESPONDENT TO ADVANCE CASE FOR HEARING.

LOUIS TITUS,
Attorney for Respondent.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.



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MOTION OF RESPONDENT TO ADVANCE CASE FOR HEARING.

Comes now the respondent in the above-entitled cause, and moves that this case be advanced for early hearing, and in support of said motion makes the following brief statement of the matters involved and the reasons relied upon for the advancement:

QUESTION PRESENTED.

The question presented in this case is whether the boundary line between the District of Columbia and the Commonwealth of Virginia is at high water mark

or at low water mark on the Virginia side of the Potomac River.

REASONS WHY CASE SHOULD BE ADVANCED.

There is a serious and honest conflict between the riparian owners on the Virginia shore of the Potomac River and the United States Government as to whether the boundary line is the low water mark or the high water mark on the southerly shore of the river. The United States is interested in many activities in connection with the Potomac River, and particularly in the southern, or Virginia, shore of the river. This suit is of special interest upon that question for the reason that the petitioner at the time the suit was brought was carrying on the work of construction complained of under a contract entered into with the Secretary of Agriculture, on behalf of the United States, pursuant to the Act of May 23, 1928, c. 719, 45 Stat. 721, entitled "An Act To authorize and direct the survey, construction, and maintenance of a memorial highway to connect the Arlington Memorial Bridge across the Potomac River at Washington."

The work of construction of the George Washington Memorial Highway is actually in progress at the present time. This highway as projected will, at a number of points, pass over the tide lands, the ownership of which is in dispute. If the boundary line between the District of Columbia and the State of Virginia be the high water mark, the tide land belongs to the United States, and there will be no necessity for the condemnation or purchase of such land by the Government. If, on the other hand, the

boundary be the low water mark, then the tide land belongs to the owners of the adjacent upland, in which event whatever tide lands are required for the Government project must be acquired either by condemnation or otherwise.

The National Capital Park and Planning Commission also is interested in the speedy determination of the question involved in this case. Under various Acts of Congress, this Commission is engaged in acquiring and constructing a system of parkways adjacent to the George Washington Memorial Highway. Until this question be determined, both the work of the Commission, and the work of constructing the National Highway will be impeded. It is the purpose of Congress, as evidenced in the various statutes it has passed, that both the Highway and the Parkways be completed in time for the Bicentennial Celebration to be held in 1932. It is, therefore, a matter of great public importance that there be a prompt determination of the question presented in this case.

I am authorized to state that the petitioner joins in requesting that this motion be granted.

WHEREFORE, respondent respectfully petitions this Court that the case be advanced upon the calendar and assigned for hearing at an early date.

Respectfully submitted,

LOUIS TITUS,
Attorney for Respondent.

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WASHINGTON AIRPORT, INCORPORATED, *Respondent*.

CONSENT OF RESPONDENT TO GRANTING OF PETITION FOR CERTIORARI.

LOUIS TITUS,
Attorney for Respondent.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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CONSENT OF RESPONDENT TO GRANTING OF PETITION FOR CERTIORARI.

PRELIMINARY STATEMENT.

While, under ordinary circumstances, a respondent opposes the granting of a petition for certiorari, nevertheless, the circumstances are such in this case that the respondent does not feel justified in filing such an opposition. The reasons for this will hereinafter appear.

THE QUESTION PRESENTED.

The question presented in this case is whether the boundary line between the District of Columbia and the Commonwealth of Virginia is at high water mark or at low water mark on the Virginia side of the Potomac River.

REASONS WHY RESPONDENT CONSENTS TO GRANTING WRIT.

Numerous cases have arisen in the courts in which the boundary line between the District of Columbia and the State of Virginia has been in question. It is conceded by every one that the boundary is either the high water mark or the low water mark on the Virginia side of the Potomac, but the true boundary has never been fixed beyond dispute by a decision of this Court. The result is never-ending conflict concerning the land between high and low water marks on the southern side of the River. These conflicts arise in many different ways:

1. The question of police jurisdiction over the disputed territory;

2. The question of the right of the State of Virginia to levy taxes on the disputed territory;

3. The question of the ownership of this tide land, for if the boundary of the District of Columbia be the high water mark on the Virginia side, then apparently the Government would be the owner of the tide land; but if the boundary be the low water mark, then the tide land belongs to the owners of the adjoining upland;

4. The question of access to the navigable part

of the Potomac River, and the right to build wharves and docks therein is affected by the ownership of the tide land, for the reason that certain officials of the Government dispute the right of the owners of the upland to cross the tide land in order to reach the navigable waters of the Potomac;

5. The question affects the program of the National Park and Planning Commission with reference to its parking project on the southerly shore of the Potomac, and, to a certain extent, affects the Government's project of constructing the George Washington Memorial Highway along the southerly shore of the Potomac. Under various statutes of Congress, the Parking and Planning Commission for the District of Columbia is planning a system of parks on the Virginia shore of the Potomac. The Secretary of Agriculture is actually engaged in constructing the Memorial Highway. At places, these parks and this highway occupy the tide lands on the south shore of the Potomac. The ownership of the tide lands being in dispute, neither the Government nor the owners of the adjoining upland can be certain of their rights, until the boundary be finally determined. From every standpoint, so far as the public's interest is concerned, it is desirable that this boundary line should be finally settled. From the standpoint of the owners of the upland property on the Virginia side of the Potomac, it is also desirable that the boundary should be settled as a means of preventing interminable litigation which will inevitably ensue unless it be settled.

6. As pointed out in the petition for certiorari on file herein, there is a clear conflict of decisions between the Court of Appeals of the District of Columbia and the Circuit Court of Appeals for the 4th Circuit.

For the foregoing reasons, and for the other reasons which have been advanced in the petition for certiorari, respondent believes that the petition should be granted.

LOUIS TITUS,
Attorney for Respondent.

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WASHINGTON AIRPORT, INCORPORATED, *Respondent.*

BRIEF FOR RESPONDENT.

LOUIS TITUS,
Attorney for Respondent.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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vs.

WASHINGTON AIRPORT, INCORPORATED, *Respondent*.

BRIEF FOR RESPONDENT.

STATEMENT OF CASE.

This action was commenced by Washington Airport, Incorporated, the respondent here, against the Smoot Sand and Gravel Corporation, the petitioner, to enjoin petitioner from dumping sand, gravel, rock, and debris upon certain tide land upon the Virginia side of the Potomac River opposite the District of Columbia, it being alleged that this tide land belonged to respondent. The action was originally commenced in the Virginia State Court and removed to the United

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Note: Italics supplied wherever used.

States District Court for the Eastern District of Virginia.

The defendant in the District Court, petitioner here, filed a motion to dismiss the complaint upon the ground that the Court had no jurisdiction over the subject-matter of the action for the reason that the tide land in controversy was not within the boundaries of the District of Columbia. The District Court sustained this motion and dismissed the bill. Upon appeal, the Circuit Court of Appeals for the Fourth Circuit reversed the judgment of the District Court and held that the tide land was within the State of Virginia and that therefore the District Court has jurisdiction. This Court granted certiorari.

SOLE QUESTION PRESENTED.

The sole question presented in this case is whether the land, lying between the ordinary high and low water marks on the Virginia side of the Potomac River and opposite the District of Columbia, is in the State of Virginia or in the District of Columbia. The answer to this question involves a determination of the boundary between the District of Columbia and the State of Virginia.

SUMMARY OF ARGUMENT.

I.

The grant by King James of England to the Commonwealth of Virginia in 1609 included not only all of the present State of Virginia but all of Maryland, parts of Pennsylvania and parts of North and South Carolina, as well as territory further West. It necessarily included all of the Potomac River. The grant

to Lord Baltimore in 1632 conflicted with the above grant by including the territory of Maryland and also all of the Potomac River. The grant to Lord Culpeper in 1660 of the northern neck of Virginia also included the Potomac River. The overlapping of these grants resulted in continuous conflict between Maryland and Virginia as to the boundary between the two States.

II.

By the Virginia Constitution of 1776, Virginia gave up her claim to the territory of Maryland, Pennsylvania, and North and South Carolina, but reasserted her claim to the entire Potomac River. By the Compact of 1785, Virginia surrendered her claim to the tide land of the Potomac on the Maryland side of the river and Maryland surrendered her claim to the tide land of the Potomac on the Virginia side of the river; but both States still continued to claim the entire river except for the shores on either bank.

III.

The Compact of 1785 did not settle the boundary between Maryland and Virginia because each State still claimed the river itself and, moreover, Maryland claimed jurisdiction over the numerous water indentations on the Virginia side of the river, many of which ran for miles into the interior of the State of Virginia. Nevertheless, this Compact did settle certain questions which had been theretofore disputed as to the boundary. It did settle that Virginia had no further claim to the high water mark on the Maryland side, but only to the low water mark; and it did

settle that Maryland had no further claim to the high water mark on the Virginia side, but only to the low water mark.

IV.

In 1791 Maryland and Virginia ceded to the United States a territory ten miles square reaching entirely across the Potomac River. This territory so ceded originally comprised the territory within the District of Columbia. In 1846 the United States regranted to Virginia the exact territory which Virginia had granted to the United States. This left the District of Columbia consisting solely of the territory which had been conveyed by the State of Maryland.

V.

Inasmuch as Maryland in 1785 had waived all claim to territory beyond the low water mark on the Virginia side, when it conveyed to the United States in 1791 it obviously could not convey the tide land which it had already ceded to Virginia. Therefore, the territory conveyed by Maryland to the United States was bounded by the low water mark on the Virginia side of the river.

VI.

While it has never been definitely determined that the grant to Lord Baltimore reached across the Potomac to the high water mark on the Virginia side, still, conceding that that grant did reach to the high water mark and therefore included the land between the high water mark and the low water mark on the Virginia side, Virginia never acquiesced in

that claim and continually asserted her rights not only to the low water mark but to the whole of the Potomac River until the Arbiters' Award of 1877, when the boundary between the two States was fixed at low water mark on the Virginia side. This Award also stated that the boundary should run from low water mark at one headland to low water mark at the next headland, thus leaving the indentations within the jurisdiction of Virginia. The Award had two principal phases: first, fixing the boundary at low water mark, and second, running the boundary straight across the mouth of all indentations from one headland to the next.

VII.

The decision of the Arbiters that the Maryland boundary did not extend beyond low water mark was based, not upon prescription, not upon historical events, but was based entirely upon the Compact of 1785. The decision of the Arbiters that the boundary should run from low water mark at one headland to low water mark at the next headland, was not based upon the Compact of 1785, because that Compact contained nothing concerning headlands, but was based entirely upon prescription, historical events, and the impractical results and inconvenience of administration which would have followed had Maryland been allowed to follow the low water mark around such indentations into the State of Virginia.

VIII.

This Court, in the case of *Maryland vs. West Virginia*, 217 U. S. 577, definitely held that the Arbiters'

Award of 1877, fixing the boundary at low water mark, was based upon the Compact of 1785, and further held that the Arbiters' decision was correct and that the Compact of 1785 was a concession by Maryland that its territory did not reach beyond the low water mark. There is nothing inconsistent with this decision in any decided point in the case of *Morris vs. United States,* 174 U. S. 196, nor in the case of *Marine Railway vs. United States,* 257 U. S. 47. In the Morris case, the only land in controversy was on the District of Columbia side of the Potomac River, and while the Court said that the grant to Lord Baltimore conveyed title to the high water mark on the southerly bank of the Potomac, that statement was not necessary to the decision of the Court. But conceding that it be a correct statement as to the effect of the grant, the Court did not have under consideration the Compact of 1785 nor the effect of that Compact upon the boundary. When the Court, in the latter case of *Maryland vs. West Virginia,* 217 U. S. 577, came to the consideration of the effect of the Compact of 1785, it directly held that that Compact was a concession by Maryland that its boundary did not extend beyond the low water mark.

IX.

Neither does the case of the *Marine Railway vs. United States,* 257 U. S. 47, conflict in any manner with the Maryland-West Virginia decision. In that case, the land involved was out in the main body of the river, beyond the low water mark, so that the question as to whether the boundary was low water mark or high water mark was not involved. It was contended, however, that as this land lay within one

of the indentations on the Virginia side of the river, and as the boundary between Maryland and Virginia had been fixed by the Arbiters' Award of 1877 as running from headland to headland, that therefore this land was within the States of Virginia. This Court, however, stated that the Compact of 1785 had not determined that the boundary ran from headland to headland, and that the subsequent Arbiters' Award of 1877 to that effect was based, not upon the Compact, but upon later historical events, and that the rights of the United States, which were fixed long prior to the Award of 1877, could not be affected by that Award to which it was not a party. The Court did not undertake in any manner to say that the Compact of 1785 was not a concession by Maryland that its boundary did not extend beyond the low water mark.

X.

Maryland having conceded, by the Compact of 1785, that its boundary did not extend beyond the low water mark, its conveyance to the United States in 1791 could only carry to the low water mark. Virginia's conveyance to the United States also carried to the low water mark; and when the United States reconveyed to Virginia in 1846 the exact territory which Virginia had conveyed to the United States, it necessarily conveyed back to Virginia everything beyond the low water mark. This being true, the land in controversy in this case is within the boundaries of the State of Virginia and the decision of the Court of Appeals should be affirmed.

ARGUMENT.

Conflicting Grants.

Original Grant to Virginia:

The first grant with which we are concerned was dated May 23, 1609. By this grant King James of England granted to the Commonwealth of Virginia a tract of land which not only included all of the present States of Virginia and Maryland, but also included portions of Pennsylvania, North Carolina and South Carolina, as well as other lands farther west.

This grant by its express terms included the whole of the Potomac River, as well as the State of Maryland. The particular language in the grant which included the Potomac River and Maryland is as follows:

> "All the territory from the point of land called Cape or Point Comfort, all along the seacoast to the Northward two hundred miles."

Grant to Lord Baltimore:

Twenty-three years subsequent to the grant to the Commonwealth of Virginia and on June 20, 1632, Charles I, King of England, made a grant to Lord Baltimore, which included substantially what is now the State of Maryland. This grant also, by its express terms, included the whole of the Potomac River. The southerly boundary of the grant was, in part, described as follows:

> "To the farther bank of said river (Potomac) and following it."

Grant to Lord Culpeper:

Twenty-eight years subsequent to the grant to Lord Baltimore, King James II, of England, on January 27, 1660, made a grant to Lord Culpeper of what was known as the "Northern Neck of Virginia." This grant also, by its express terms, included the Potomac River, the exact language being:

> "the Potomac River and all the islands within the outermost banks thereof."

Copies of these grants may be found in *Thorpe's Charters* and *Constitutions.*

All Three Grants Included the Potomac River.

These three grants were highly conflicting. The grant to Lord Baltimore conflicted with the original grant to the Commonwealth of Virginia by covering a large part of the territory in the original grant. The third grant, to Lord Culpeper, conflicted with the grant to Lord Baltimore because each grant, by express terms, included the Potomac River. In fact, each one of the three grants covered the whole of the Potomac River, and thus each grant conflicted with each of the others.

Following these conflicting grants, it was inevitable that many controversies should arise. Various phases of these controversies were adjusted from time to time, and various concessions were made by the States interested.

Various Statutes, Concessions and Agreements Affecting the Boundary Between Maryland and Virginia.

Earliest Statutes of Virginia claimed Tide Lands:

From the very earliest times down to the present, Virginia has consistently dealt with the tide lands as if those tide lands were within its jurisdiction. The first statute, passed in 1679, is found in 2 *Henning's Statutes,* p. 456. It is as follows:

> "It is ordered and declared by this grand assembly that every man's right by vertue of his pattent extend into the rivers or creekes soe farre as low water marke, and it is a privilege granted to him in and by his pattent, and that therefore noe person ought to go and ffish there above low water marke or hale their sceanes on shoare (without leave first obtained) under the hazard of permitting a trespass for which he is sueable by law."

In 1669, Virginia made a grant of a tract of land, including the land in controversy, to one Howsing. This grant, by its terms, was bounded by the Potomac River. Ten years later, the above Statute (*2 Henning's,* 456) was passed providing that the owner of land bordering on any river or creek should own the land down to the low water mark. At various times since the passage of this original Act, the legislature of Virginia has adopted similar laws, and the Supreme Court of Appeals of Virginia has repeatedly held that the owner of the upland is also the owner of the adjoining tide lands, not that the owner has a mere right or easement in such tide lands, but that he owns an absolute title thereto.

Taylor v. Commonwealth, 102 Va. 759.
French v. Bankhead, 11 Grat. 136.
Steelman v. Field, 142 Va. 383.

Virginia Constitution of 1776, While Making Many Concessions, Asserted Title to Tide Lands:

On June 29, 1776, the Commonwealth of Virginia adopted a Constitution which surrendered the claims of Virginia to the territory of Pennsylvania, Maryland, North Carolina and South Carolina. But the same clause of the Constitution, which surrendered the claims of Virginia to the territory embraced within these several States, asserted Virginia's right to the Potomac River and to the tide lands along said river. The particular provision of the Virginia Constitution of 1776 covering this matter is as follows:

> "The territories contained within the charters, erecting the colonies of Maryland, Pennsylvania, North and South Carolina are hereby ceded, released and forever confirmed, to the people of these colonies respectively, with all the rights of property, jurisdiction and government, and all other rights whatsoever, which might, at any time heretofore, have been claimed by Virginia, except the free navigation and use of the rivers Potomoque and Pokomoke, *with the property of the Virginia shores and strands,* bordering on either of said rivers, and all improvements which have been or shall be made thereon."

While in this Constitution Virginia expressly surrendered her claim to the territory of Maryland, it expressly excepted from such surrender the Potomac River, including the tide land along that river. The words "shores and strands", as will be hereinafter shown, when applied to tidal water, means the land

covered and uncovered by the ordinary flow and ebb of the tide. So that when Virginia conceded to Maryland her claim to practically the entire territory covered by the charter of Maryland, she did not concede the Potomac River nor the tide lands, but expressly reserved the River and the tide lands from such concession.

Virginia Code also follows Constitution in asserting Virginia's claim to shores of Potomac:

Following the Constitution, the legislature of Virginia passed a law which is now embodied in Section 9 of the Virginia Code. The pertinent portion of this section of the Code is as follows:

> "And the people of Virginia, when they adopted their Constitution or form of government, on the twenty-ninth of June, seventeen hundred and seventy-six, having by the twenty-first section thereof ceded, released, and confirmed to the people of Maryland, Pennsylvania, North and South Carolina, such parts of the territory of Virginia as were contained within the charters erecting those colonies, with all the rights in those parts which might theretofore have been claimed by Virginia, except the free navigation of the rivers Potomac and Pocomoke, *with the property of the Virginia shore or strands bordering on either of the said rivers,* and all improvements thereon; * * *"

Compact of 1785:

Subsequent to the adoption of the Virginia Constitution, there was still a conflict between the States

of Maryland and Virginia as to jurisdiction over the Potomac River, and the tide lands along that river. The question as to which State had jurisdiction over the river, and therefore could impose duties upon ships sailing thereon, and also which State had jurisdiction over the fishing rights, were frequent subjects of dispute between the two States. These frequent disputes resulted finally in the Compact of 1785. While this Compact deals largely with the question of jurisdiction over the river and the navigation thereof, and the right of fishing therein, it also deals with the territorial claims of the two States and particularly with the ownership of the tide lands bordering the River.

This Compact was in the nature of a compromise, which gave each State equal rights of navigation and fishing. It was also a compromise as to the ownership of the tide lands. By that Compact, each State definitely abandoned its claim to the tide land on the shore of the other State. The particular section of the Compact relating to the shores of the Potomac is Section 7. That section is as follows:

> "Seventh: The citizens of each State, respectively, shall have full property in the shores of the Potomac River, adjoining their lands, with all emoluments and advantages thereunto belonging, and the privileges of making and carrying out wharves and other improvements, so as not to obstruct or injure the navigation of the river; but the right of fishing in the river shall be common to and equally enjoyed by the citizens of both States; provided, that such common right be not exercised by the citizens of one State to the hindrance or disturbance of the fisheries on the shores of the other state; and that the

citizens of neither State shall have a right to fish with nets or seines on the shores of the other."

Meaning of Word "Shore."

It is to be noted that this section contains the following language:

> "The citizens of each state respectively shall have full property in the shores of the Potomac River, adjoining their lands. * * *"

The word "shore" means the ground between ordinary high-water and ordinary low-water mark.

In *Shively v. Bowlby*, 152 U. S. 1, the court, at page 12 of the opinion, quoted with approval from Hargrave's Law Tracts, as follows:

> "The shore is that ground that is between the ordinary high water and low water mark."

There can be no doubt that the word "shore" means the land between the low-water and high-water mark. For a collection of cases showing that this is the true definition, see Words and Phrases, Second Series, Vol. 4, p. 575.

It therefore follows that when the State of Maryland agreed in the Compact of 1785 that the citizens of Virginia should have full property in the shores of the Potomac adjoining their lands, it was a waiver by the State of Maryland of whatever claim it had to the land lying between the low-water and high-water mark, and this Court so held in the case of *Maryland v. West Virginia*, 217 U. S. 577.

Compact of 1785 was a Waiver by Maryland of all claim beyond the Low Water Mark.

It is true, as this Court pointed out in the case of *Marine Railway Co. vs. U. S.*, 257 U. S. 47, that this Compact did not settle the boundary between the two States. In that case this Court in referring to the Compact said:

> "It says nothing about the boundary in terms"; (p. 63 of Opinion)

and again:

> "it left the question of boundary open to long and continued disputes." (See page 64 of opinion.)

While this Compact did not settle the question of the boundary between the two States, it did go a long way towards settling that question. By this Compact Virginia definitely abandoned any claim beyond the low water mark on the Maryland side of the river, and Maryland, just as definitely, abandoned any claim beyond the low water mark on the Virginia side of the river. But this left each State still claiming the main part of the river. Moreover, it left Maryland still claiming jurisdiction over the many deep bays or water indentations on the Virginia side of the Potomac. These remaining disputes were never settled until the Commissioners' Award of 1877, which was ratified by the two States in 1878. So that, while this Compact "left the question of boundary open to long and continued disputes", it at least settled one question, and that was that Maryland's boundary did not extend beyond the low water mark on the Virginia side.

The language of the Compact, by which each State surrendered its claim to the tide lands upon the shores of the other States is as follows:

> "The citizens of each State respectively, shall have full property in the shores of the Potomac River adjoining their lands with all emoluments and advantages thereunto belonging."

The section then provided for a common right of fishing to be enjoyed by the citizens of both States, but provided that such rights should not be exercised by the citizens of one State to the hindrance of the fisheries on *"the shores of the other State,"* and that the citizens of neither State should have a right to fish with nets or seines *"on the shores of the other."*

This language is a definite recognition that the shores of the Potomac belonged to the adjoining State; indeed, the first provision that:

> "The citizens of each State respectively, shall have full property in the shores of the Potomac River adjoining their lands"

is, in effect, a conveyance or quit-claim by each State of all the rights of such State in the tide lands to the owners of the adjoining upland.

This language does not admit of an interpretation which would permit Maryland to still claim the tide land on the Virginia side. In fact this Court, in the case of *Maryland vs. West Virginia,* 217 U. S. 577, definitely held that this Compact was a concession by the State of Maryland that its boundary did not extend beyond low water mark on the Virginia shore. The language of the Court in that case covering this matter is that the Compact is:

"inconsistent with the claim that the Maryland boundary on the south side of the Potomac shall extend to the high-water mark." (See page 580 of opinion.)

Here is a definite statement by this Court that the language of this Compact cannot be reconciled with a further claim on the part of the State of Maryland to the tide land on the Virginia side.

Compact of 1785 Granted Title to Tide Lands—Not Merely an Easement.

In the Brief filed on behalf of the United States it is repeatedly asserted that the Compact of 1785 merely granted an easement of servitude in the tide lands to the owners of the upland on the Virginia side. For example, on page 15 of the Brief appears the following:

"The Compact of 1785 was a treaty between two sovereign States, dealing with the use of the river upon principles of public law. So long as it remained in force, it merely accorded to Virginia and her citizens rights and privileges in the nature of easements and servitudes in the shore and stream of the Potomac. The privileges accorded to Virginia and her citizens amounted to no more than a recognition of the servitude in the stream which is generally allowed in favor of the citizens or subjects of a neighboring sovereign. A cession of such privileges does not negative the retention of territorial sovereignty or ownership, nor does it change boundary lines."

And again the Brief says:

"The grant of a servitude in the waters and adjacent shore did not in any respect modify the

> boundary as originally fixed at high-water mark by the charter granted to Lord Baltimore."

While it is true that the Compact of 1785 did grant certain easements or privileges to the riparian owners on the Virginia side—for example, the right of carrying out wharves into the main channel of the river—still such easement or privilege had nothing to do with the tide lands. As to these tide lands there was no easement or privilege granted, but the grant was of the entire ownership. The language is:

> "The citizens of each State, respectively, shall have full property in the shores of the Potomac River adjoining their lands."

This is not a grant of a privilege nor a servitude, but is a grant of the full property right; and the statement of counsel that this Compact "did not in any respect modify the boundary as originally fixed at high-water mark by the charter granted to Lord Baltimore" is flatly contradicted by the decision of this Court in the case of *Maryland vs. West Virginia*, 217 U. S. 577, where the Court said at page 580 of the opinion that this Compact was "inconsistent with the claim that the Maryland boundary on the south side of the Potomac River shall extend to high-water mark." (For an analysis of the decision in the case of *Maryland vs. West Virginia*, see *infra* page 21.

Further Controversies as to Boundary After Compact of 1785.

While the Compact of 1785 contained a concession on the part of Maryland that its boundary did not extend beyond the low water mark on the Virginia

side of the Potomac, still that did not settle the controversy in its entirety. On the Virginia side of the River, were numerous deep indentations running for miles into the heart of Virginia. These indentations are tidal in their character, and, if the claim of Maryland to the low water mark were to be literally interpreted, it would necessarily mean that Maryland would have jurisdiction over these indentations for miles into the interior of Virginia. Naturally, Virginia disputed this claim, as well as disputing Maryland's claim to jurisdiction over the main river.

To settle these controversies, the legislature of each State, in 1874, appointed commissioners for the purpose of ascertaining and fixing the boundary between the two States. These Commissioners made an award in 1877, in which they held that the Compact of 1785 had definitely settled that the boundary of Maryland did not extend beyond the low water mark on the Virginia side. The Commissioners further held that the boundary should not follow the low water mark into each one of the many indentations on the Virginia side, but should be drawn from headland to headland, thus leaving all of the indentations within the jurisdiction of the State of Virginia. This latter conclusion was reached by reason of the fact that Virginia had continuously asserted jurisdiction over these inland waters. No doubt the Commissioners were also moved by the absurd results which would have followed if Maryland's claim to the indentations had been sustained.

The Commissioners fixed the boundary at low water mark because Virginia had, from the earliest times, asserted sovereignty over the land down to low water mark, and because, in the Compact of 1785, Mary-

land had conceded the claim of Virginia to the tide lands on the Virginia side. In their report, the Commissioners used the following language:

> "The evidence is sufficient to show that Virginia, from the earliest period of her history, used the South bank of the Potomac as if the soil to low water mark had been her own. She did not give this up by her Constitution of 1776, when she surrendered other claims within the charter limits of Maryland; but on the contrary, she expressly reserved 'the property of the Virginia shores or strands bordering on either of said rivers, (Potomac or Pocomoke) and all improvements which have or will be made thereon.' *By the compact of 1785, Maryland assented to this*, and declared that 'the citizens of each State respectively shall have full property on the shores of the Potomac, and adjoining their lands, with all emoluments and advantages thereunto belonging, and the privilege of making and carrying out wharves and other improvements.'"

Thus this Commission, which this Court said was composed of eminent lawyers, (*Maryland vs. West Virginia*, 217 U. S. p. 579 of opinion), held that the Compact of 1785 was a concession by Maryland that its boundary did not extend beyond the low water mark on the Virginia side of the Potomac.

This Compact and its effect was before this Court in the case of *Maryland vs. West Virginia*, 217 U. S. 577. That case is a direct holding by this Court, that the Compact was a concession by Maryland of all claim beyond the low water mark on the southerly side of the River.

Decision of this Court in Maryland vs. West Virginia is Conclusive that the Compact of 1785 Had the Effect of Establishing the Boundary at Low Water Mark.

In the case of *Maryland vs. West Virginia*, the Court rendered two opinions: one in 217 U. S., p. 1, and the other at 217 U. S., p. 577. In that case the action had been instituted by Maryland against West Virginia in the Supreme Court of the United States to settle the boundary between the two States along the westerly line of Maryland. The so-called Deakin's Line, purporting to fix the western boundary of Maryland, had been established in 1787. This line established the head waters of the Potomac at Fairfax Stone, and ran north from that point. This line, while acceptable to Virginia, was not acceptable to Maryland, and long-continued controversy resulted.

In 1859, a new line was run for the State of Maryland, which fixed the head waters of the Potomac at Potomac Stone, a point farther West than Fairfax Stone, and ran north from that point. This left in dispute the territory between the two lines, one running North from Potomac Stone and the other running North from Fairfax Stone. In 1891, Maryland instituted the action against West Virginia, as an original proceeding in this Court, to have its boundary established at the Westerly line. West Virginia, in a cross-bill, asked to have the boundary between the two States established at the Deakins line, and also asked to have the boundary from Harper's Ferry to the Westerly boundary of Maryland established at the North bank of the Potomac River.

This Court, in the first decision, 217 U. S. 1, held

that the West Virginia-Maryland boundary began at Fairfax Stone rather than at Potomac Stone, thus finding in favor of West Virginia; and, second, the Court held that the boundary along the Potomac was not the North bank of that River but was the South bank, thus finding this issue in favor of Maryland. While this second finding determined that the boundary of West Virginia did not reach across the Potomac to the North bank, it left uncertain whether the true boundary was the low water mark or the high water mark on the Southerly side of the River.

After the first opinion, decrees were prepared by counsel: one for Maryland, which placed the boundary at the high water mark on the Southerly side of the Potomac River; the other, prepared by West Virginia, which placed the boundary at the low water mark.

The issue thus presented had not been determined by the Court in its first decision. Therefore, the second decision, found in 217 U. S. 577, was rendered. The Court in this second opinion held that the boundary between Maryland and West Virginia was the low water mark on the Southerly side of the Potomac. In reaching this conclusion, the Court referred to the arbitration award of 1877 between the States of Maryland and Virginia, and after stating that the award was made by eminent lawyers, quoted from the award as follows:

> "The evidence is sufficient to show that Virginia, from the earliest period of her history, used the South bank of the Potomac as if the soil to low water mark had been her own. She did not give this up by her Constitution of 1776, when she surrendered other claims within the

charter limits of Maryland; but on the contrary, she expressly reserved 'the property of the Virginia shores or strands bordering on either of said rivers (Potomac or Pocomoke), and all improvements which have or will be made thereon.' *By the compact of 1785, Maryland assented to this,* and declared that 'the citizens of each State respectively shall have full property on the shores of the Potomac, and adjoining their lands, with all emoluments and advantages thereunto belonging, and the privilege of making and carrying out wharves and other improvements.'

* * * * * * * * *

"Taking all together, we consider it established that Virginia has a proprietary right on the south shore to low water mark, and, appurtenant thereto, has a privilege to erect any structures connected with the shore which may be necessary to the full enjoyment of her riparian ownership, and which shall not impede the free navigation or other common use of the river as a public highway.

"To that extent Virginia has shown her rights on the river so clearly as to make them indisputable."

After making the above quotation from the award, the Supreme Court continued:

"The compact of 1785 (see Code of Virginia, v. 1, title 3, ch. 3, Sec. 14, p. 16) is set up in this case, and its binding force is preserved in the draft of decrees submitted by counsel for both States. We agree with the arbitrators in the opinion above expressed, *that the privileges therein reserved respectively to the citizens of the two States on the shores of the Potomac are inconsistent with the claim that the Maryland boundary on the south side of the Potomac River*

shall extend to high-water mark. There is no evidence that Maryland has claimed any right to make grants on that side of the river, and the privileges reserved to the citizens of the respective States in the compact of 1785 and its subsequent ratifications indicated the intention of each State to maintain riparian rights and privileges to its citizens on their own side of the river.

"This conclusion gives to Maryland a uniform southern boundary along Virginia and West Virginia at low-water mark on the south bank of the Potomac River to the intersection of the north and south line between Maryland and West Virginia, established by the decree in this case. This conclusion is also consistent with the previous exercise of political jurisdiction by the States respectively.

"The decree will therefore provide for the South bank of the Potomac River at low-water mark on the West Virginia shore as the true southern boundary line of the State of Maryland."

Here is a direct holding by this Court that the Compact of 1785 is inconsistent with any claim on the part of Maryland that the boundary was the high water mark on the Virginia side, and that the Compact was a virtual concession by Maryland that the boundary was the low water mark.

Grants by Maryland and Virginia to the United States of the Territory Within the District of Columbia.

In 1788 the State of Maryland passed an act providing for the cession to the United States of an area ten miles square. In 1789 the State of Virginia passed a similar act. On July 16, 1790, Congress

passed an Act accepting a district or territory not exceeding ten miles square located on the Potomac River, and authorized the President to appoint commissioners to define the boundary of the District. In 1791 the commissioners were appointed and the ten miles were shortly thereafter selected. On December 17, 1791, Maryland passed an act ceding to the United States that portion of the ten miles square which lay within the boundaries of that State. This Act contained the following provision:

> "Provided that nothing herein contained shall be so construed to vest in the United States any right of property in the soil, so as to affect the rights of individuals therein, otherwise than the same shall or may be transferred by such individuals to the United States."

Virginia also passed a similar statute ceding to the United States that portion of the ten miles so selected, the Virginia statute containing a similar proviso as to individual property rights.

Regrant by United States to Virginia:

On July 9, 1846, Congress passed an Act ceding to the State of Virginia the territory which Virginia had formerly ceded to it (9 Stat. L. Page 35), the language of this act being:

> "all of that portion of the District of Columbia ceded to the United States by the State of Virginia, and all the rights and jurisdiction therewith ceded over the same be, and the same are hereby, ceded and forever relinquished to the State of Virginia, in full and absolute right and jurisdiction as well of soil as of persons residing or to reside thereon."

It will be noted from the terms of this Act that the United States reconveyed or receded the exact territory which Virginia had formerly ceded to the Government. This left the status of the boundary entirely unaffected by such cession and recession. As expressed by Mr. Justice Holmes in the Marine Railway case (257 U. S. 47):

> "The original state of things was not changed by the grant of Virginia and the regrant by the United States of the part of the District on the Virginia side." (See page 63 of opinion.)

Grant by Maryland to the United States of Territory in District of Columbia Only Extended to Low Water Mark.

It is important to determine what part of the District of Columbia was acquired from Maryland and what part was acquired from the State of Virginia, because when Congress subsequently receded to Virginia the exact territory which Virginia had conveyed to the United States, the sole territory remaining a part of the District of Columbia was that which had been conveyed by the State of Maryland.

It is obvious that if the Compact of 1785 operated to fix the boundary between Maryland and Virginia at the low water mark on the Virginia side, as this Court held in the case of *Maryland vs. West Virginia*, then when Maryland conveyed to the United States in 1791, six years after the Compact was signed, it conveyed only to the low water mark. Manifestly Maryland could convey nothing with which it had already parted; therefore the conveyance from Maryland to the United States was limited by the low water mark on the Virginia side of the River.

It is equally true that when Virginia conveyed to the United States in 1791 that State's conveyance reached also to the low water mark on the Virginia side, and when the United States subsequently conveyed back to Virginia the exact territory which Virginia had conveyed, it necessarily conveyed back all the land beyond the low water mark on the Virginia side. These considerations determine that the present boundary between the District of Columbia and the State of Virginia is the low water mark on the Virginia side of the River.

No Decisions by this Court Which Conflict With Conclusion that Boundary is Low Water Mark.

We have already seen that this Court, in the case of *Maryland vs. West Virginia,* 217 U. S. p. 577, held that the Compact of 1785 in effect established the boundary between Maryland and Virginia at the low water mark on the Virginia side. While there has been a conflict in the decisions of other Courts as to the effect of this Compact and as to the boundary line between the District of Columbia and the State of Virginia, still there is no decision by this Court which is in any wise in conflicts with the decision in the case of *Maryland vs. West Virginia.*

Morris vs. United States, 174 U. S., 196.

The case most frequently cited in support of the contention that the boundary is the high water mark is *Morris vs. United States,* 174 U. S. 196. In this case it appeared that the Federal Government had reclaimed certain land in the bed of the Potomac River lying adjacent to the District of Columbia shore, the land being known as Potomac Flats. All

of the land involved in the case was located on the District of Columbia side of the River, far beyond the low water mark on the Virginia shore, so that the question of the boundary line between the District of Columbia and Virginia was not in issue. The Marshall heirs claimed this land through the grant to Lord Culpeper. The contention was that the Lord Culpeper Grant reached across the Potomac and included the tide land on the northerly side of the River.

The case had originally been tried in the Supreme Court of the District of Columbia and the opinion of Mr. Justice Hagner is reported in 23 Wash. L. Rep. 745. In considering the contention of the Marshall heirs, Mr. Justice Hagner referred to the Statute hereinbefore cited (1 Hennings Stat. Chap. 87), which extended the ownership of land to the low water mark, and said that it was—

> "a limitation fatal to a claim to any part of the soil in controversy in this cause, all of which lies on the north side of the Virginia channel and of course far beyond the low water mark on the Virginia shores of the river."

So that there can be no doubt that the boundary between Virginia and the District of Columbia was not in any way involved in that action.

It is true that this Court, at page 225 of the Opinion, said:

> "For, even if the latter be the correct view, we agree with the conclusion of the court below, that, upon all the evidence, the charter granted to Lord Baltimore, by Charles I, in 1632, of the territory known as the Province of Maryland,

embraced the Potomac River and the soil under it, and the islands therein, to high water mark on the southern or Virginia shore; that the territory and title thus granted to Lord Baltimore, his heirs and assigns, *were never divested by any valid proceedings prior to the Revolution; nor was such grant affected by the subsequent grant to Lord Culpeper.*"

This statement by the Court was entirely outside of any issue before the Court, and, so far as we can find, the question was not raised by any of the parties, nor was it presented in any argument to the Court. In any event, it was outside of any issue in the case and should be treated as pure dictum. *United States vs. Corbett*, 215 U. S. 238. That this statement of the Court that the grant to Lord Baltimore reached to high water mark was outside any issue in the case is practically conceded by petitioner in his Brief at page 12.

Unlikely that Grant to Lord Baltimore was Intended to Include Tide Lands on Virginia Side of River.

It seems hardly probable that the grant to Lord Baltimore was intended to not only include the whole of the Potomac River but even the shores of that River on the Virginia side. It is the usual situation that a country bounded by a river extends to low water mark, and it would be intolerable if the country on the other side should reach entirely across the river and extend to the high water mark on the other shore.

We note that counsel for the United States contend that where a stream divides two countries and the ownership of the stream belongs to one of them,

the ownership extends to the opposite bank as accessory to the use of the stream and *Hall's International Law* and *Moore's International Law Digest* are both cited to this effect. We do not think that these authorities mean to say that the ownership extends to the high water mark on the opposite shore of the River, but if that is what they mean, then they are exactly contrary to the decision of this Court in the case of *Hadley's Lessee vs. Anthony,* 5 Wheat. 374. In that case Chief Justice John Marshall said:

> "If, instead of an annual and somewhat irregular rising and falling of the river, it was a daily and almost regular ebbing and flowing of the tide, it would not be doubted, that *a country bounded by the river would extend to low-water mark. This rule has been established by the common consent of mankind. It is founded on common convenience.* Even when a state retains its dominion over a river which constitutes the boundary between itself and another state, it would be extremely inconvenient, to extend its dominion over the land on the other side, which was left bare by the receding of the water. And this inconvenience is not less, where the rising and falling is annual, than where it is diurnal. Wherever the river is a boundary between states, it is the main, the permanent river, which constitutes that boundary; *and the mind will find itself embarrassed with insurmountable difficulty, in attempting to draw any other line than the low water mark.*"

And again on page 383 of the Opinion the Court said:

> "If a river, subject to tides, constituted the boundary of a state, and at flood, the waters of

the river flowed through a narrow channel, round an extensive body of land, but receded from that channel at ebb, so as to leave the land it surrounded at high water, connected with the main body of the country; this portion of territory could scarcely be considered, as belonging to the state on the opposite side of the river, although that state should have the property of the river. *The principle, that a country bounded by a river, extends to low-water mark, a principle so natural, and of such obvious convenience as to have been generally adopted,* would, we think, apply to that case. We perceive no sufficient reason, why it should not apply to this."

In view of the foregoing it seems at least doubtful if the original grant to Lord Baltimore was intended to include the tide lands on the Virginia side, but, even assuming that this be true, it is certain that Virginia did not acquiesce in this claim but that it, from the earliest times, claimed the tide land as its own. It is also certain that Maryland, in the Compact of 1785, acquiesced in this claim, as this Court held in the case of *Maryland vs. West Virginia.* So that, even conceding that the grant to Lord Baltimore carried the boundary of Maryland to the high water mark on the Virginia side of the River, still that boundary was changed by the Compact of 1785 to the low water mark.

Further Consideration of Morris vs. United States, 174 U. S. 196.

There is nothing in the Morris case which conflicts with this conclusion. Much is made of the statement in the Morris case, that the grant to Lord Baltimore

reached to high water mark on the Southern or Virginia shore and—

> "that the territory and title thus granted to Lord Baltimore, his heirs and assigns, were never divested by any valid proceedings *prior to the Revolution,* nor was such grant affected by the subsequent grant to Lord Culpeper." (See page 225 of opinion.)

The Court does not say that the Compact of 1785 did not change the boundary. It merely states that the grant was not affected by the grant to Lord Culpeper, which, of course, was obviously true, and also that the territory and title "were never divested by any valid proceedings prior to the Revolution."

By "valid proceedings prior to the Revolution" the Court undoubtedly meant valid legal proceedings in England to divest Lord Baltimore of his title. This term is elaborated more fully in the opinion of the trial court. Thus on page 750 of 23 Wash. L. Rep., Justice Hagner says:

> "There is no pretention that any consent was given (the consent of Lord Baltimore) or that any sentence or decree of divestiture was passed."

So that all this statement can possibly mean is that the original grant carried to the high water mark, and that there were no proceedings in England prior to the Revolution to annul Lord Baltimore's title.

The Court was not considering the Compact of 1785, nor the effect of that Compact upon the boundary line, because that Compact had been en-

tered into *subsequent* to the Revolution, not "prior to the Revolution." When this Court in a later case, did come to the consideration of the effect of the Compact of 1785 upon the boundary, it held that that Compact operated to fix the boundary at the low water mark (*Maryland v. West Virginia,* 217 U. S. 577).

Marine Ry. Co. vs. United States, 257 U. S. 47.

The second case upon which Petitioner largely relies is the Marine Railway case. That case involved only land which lay below the low-water mark on the Virginia side, and is therefore not in point here. The first sentence of the court's opinion is as follows:

> "This is a suit brought by the United States in the Supreme Court of the District of Columbia to recover possession of a strip of land on the Potomac River front of the City of Alexandria. Except an insignificant portion, as to which no special defense was made and which, it is agreed, may be disregarded, *this strip lay below the low-water mark* until it was filled in by the United States."

So that there can be no question that all the land in that case was below the low-water mark, and title to such land is conceded to be in the United States.

That the Supreme Court, in the Marine Railway case, did not intend to detract in the slightest degree from the decision in the West Virginia case is shown by the reference of the Court to that case. This is found on page 63 of the opinion, and is as follows:

> "That the original title of Maryland extended at least to *low-water mark on the Virginia side,*

it is now too late to deny, in view of the decisions in Maryland v. West Virginia and Morris v. the United States."

Again the Court said, on the same page:

"The former decisions of the Court must be followed as far as they go."

So that the Court not only did not intend to withdraw anything which had been decided in the West Virginia case, but on the contrary reaffirmed the decision in that case.

Referring to the Compact of 1785, the Court said:

"The compact between Virginia and Maryland in 1785 also seems to us to have no bearing upon the case."

Of course it had no bearing upon the case, because all the land involved in the case was below the low water mark. The Court had previously said that the original title of Maryland extended at least to low water mark. There was no acquiescence in that Compact on the part of Maryland that the title of the Virginia owners should extend below the low water mark, but only to the low water mark. So that, inasmuch as the land involved in the Marine Railway case was all below the low water mark, it is apparent that the Compact of 1785 could have no bearing upon the question as to who owned the land below the low water mark.

In referring to the Compact, the Supreme Court further said:

"It left the question of boundary open to long-continued disputes."

This is historically true because while, by the Compact of 1785, Virginia had conceded the tide lands on the north side of the River to Maryland, and Maryland had conceded the tide lands on the south side of the river to Virginia, still neither State had given up its claim to jurisdiction over the main part of the river. Moreover, there are numerous deep indentations on the Virginia side of the River, and Virginia did not relish the claim of Maryland to follow the low water mark along these indentations for miles into the interior of the State of Virginia, and so Virginia continued to claim jurisdiction over these indentations. Its right over these indentations, however, was not finally determined until the arbitration agreement of 1877, when the boundary was fixed at low-water mark from head-land to head-land, thus placing all the indentations in Virginia. Moreover, Virginia had also persistently claimed jurisdiction over the Potomac River, first over the whole River and later over half the River. (See Report of Joint Commissions, cited on page 26, petitioner's brief.)

The Supreme Court in the Marine Railway case was thus merely stating, as an historical fact, that the Compact of 1785 left the boundary open to future disputes, which, of course, it did. At the same time, the Supreme Court did not overrule the decision in the West Virginia case that by that Compact Maryland had waived all claim beyond the low-water mark on the Virginia side.

The Supreme Court further said in the Marine Railway case that the arbitration agreement of 1877,

which was accepted by the two States in 1878, did not affect the rights of the United States. Obviously, it could not have any such effect. The United States was not a party to that agreement. It did not purport to fix the boundary between Virginia and the District of Columbia, but only purported to fix the boundary between Maryland and Virginia where those States were contiguous. That Award fixed the boundary at low water mark from headland to headland, thus conceding Virginia's claim that it had jurisdiction over the indentations of the river on the Virginia side. The Supreme Court said that this did not give Virginia jurisdiction over the indentations opposite the District of Columbia, because the United States was not a party to the agreement, and the Award of 1877, granting Virginia jurisdiction over the indentations, could not affect the indentations opposite the District.

It must be remembered that the land involved in the Marine Railway case lay in the main bed of the Potomac River below the low water mark on the Virginia side. It must also be remembered that this land lay within an indentation on the Virginia shore, so that if the rule that the line ran from headland to headland were to be adopted, the land would have been within the State of Virginia. The Court held that the boundary of the District of Columbia extended at least to low water mark on the Virginia side and that the rule that the line should run from headland to headland did not apply to the District of Columbia because that rule was first established by the award of 1877, long after the rights of the United States had been fixed; also that the United States was not a party to that award and was there-

fore not bound by it. There is nothing whatever in the case which holds or even intimates that the boundary extends beyond the low water mark, the entire holding being that the boundary of the District of Columbia extends at least to the low water mark and that it does not follow the rule of running from headland to headland.

Decisions of Court of Appeals of District of Columbia Are Conflicting.

There are three cases decided by the Court of Appeals of the District of Columbia where the question of the boundary between the District and the State of Virginia has been considered. In two of these cases the Court of Appeals held that the boundary was the high water mark on the Virginia side. In the other case the Court held that the boundary was the low water mark.

The two cases in which the Court of Appeals held the boundary to be the high water mark are *Evans v. United States,* 31 D. C. App. 544, and *Herald v. United States,* 52 D. C. App. 147. The case in which the same court held the boundary to be the low water mark is the *Marine Railway* case, 49 D. C. App. 258, also reported in 265 Fed. 437.

In both the Marine Railway case and the Herald case, the District Court of Appeals undertook to interpret the decision of the Supreme Court in the case of Maryland v. West Virginia. In the Marine Railway case, concerning the Maryland v. West Virginia case, the Court of Appeals said:

> "In the recent case of Maryland v. West Virginia, 217 U. S. 577, 30 Sup. Ct. 63, 54 L. Ed.

888, the court, considering the award of 1878, by which the boundary between the states of Maryland and Virginia was fixed at the low-water line on the Virginia shore, held, in effect, that *this line had been established by the compact of 1785*. The United States was not a party to the award of 1878, and her status with respect to the boundary between the District of Columbia and Virginia was not involved. *However, as we interpret the opinion, it holds that the boundary was established at low-water mark by the Compact of 1785*, and, unless affected by the exercise of political jurisdiction by the United States, it *likewise fixes the boundary of the District of Columbia* as ceded by Maryland in 1789, four years after the compact, since whatever territory and right to the soil under the Potomac was ceded to the United States by Virginia in 1789 was receded in 1846."

Here is a clear statement by the Court of Appeals of the District that the Supreme Court had held in the case of Maryland v. West Virginia that the Compact of 1785 established the boundary at low water mark, and that that Compact also established the boundary of the District of Columbia at the low water mark, as Maryland's cession of the District to the United States was several years after the Compact was made.

In the *Herald* case, 52 D. C. App. 147, the Court of Appeals, apparently entirely overlooking what it had said in the Marine Railway case, said of the Maryland v. West Virginia case:

"The court in that case held that the State of Maryland extends only to the low water mark on the Virginia shore. This decision, however, was based chiefly upon the award of 1878, which

was later held in the Marine Railway case to have no application to the boundary between the District and Virginia."

How the Court of Appeals could have so misinterpreted the decision of this Court in the case of Maryland v. West Virginia, it is impossible to understand. The State of West Virginia was not a party to the award of 1877 and had nothing whatever to do with it. The arbiters did not purport to determine the boundary between West Virginia and Maryland, nor could they by any possibility have attempted to determine such boundary. An agreement between Maryland and Virginia, to which West Virginia was not a party, and was not even consulted, could not possibly have affected the boundary of West Virginia.

In the case of *Marine Railway v. United States*, 257 U. S. 47, this Court said that this award of 1877 could not affect the boundary between Virginia and the District of Columbia because the District had been created long prior to the agreement. By the same process of reasoning, the agreement of 1877 could not have affected the boundary between West Virginia and Maryland because West Virginia had been created and its rights fixed long prior to the agreement.

This Court did not make, and obviously would not have made, such a decision as the Court of Appeals said it made. That is, that an agreement between Maryland and Virginia made in 1877, long after the creation of the State of West Virginia, and to which agreement West Virginia was not even a party, fixed the boundary of the State of West Virginia. This

Court did not in any manner base its decision in Maryland v. West Virginia on the award of 1877. On the contrary, it based its decision entirely upon the Compact of 1785, which compact existed long prior to the creation of the State of West Virginia.

It is true that this Court, in the Maryland-West Virginia case, quoted at length from the arbiters' decision of 1877, but that was merely to approve the process of reasoning adopted by the arbiters in arriving at the conclusion that the boundary between Virginia and Maryland was fixed by the Compact of 1785 at the low water mark. The arbiters held that the Compact of 1785 fixed the boundary between Maryland and Virginia at low water mark, and this Court said that it agreed with the arbiters that the Compact of 1785 did so fix the boundary. This Court further held that, inasmuch as the Compact of 1785 was signed long prior to the creation of the State of West Virginia, that Compact fixed the boundary for the whole length of the contiguous portions of Maryland and Virginia as they existed in 1785, and that, therefore, West Virginia, which had been carved out of the State of Virginia subsequently to the Compact of 1785, must necessarily take the same boundary that had been the boundary of the State of Virginia prior to the creation of West Virginia.

By exactly the same process of reasoning it inevitably follows that the District of Columbia, which was created six years after the Compact of 1785, must take the same boundary which had been fixed by that Compact.

CONCLUSION.

The Compact of 1785 was a relinquishment by Maryland to Virginia of all claim beyond the low water mark on the Virginia shore. When Maryland conveyed to the United States in 1791, it therefore conveyed nothing beyond the low-water mark. When the United States, in 1846, reconveyed to Virginia exactly the same territory that Virginia had originally conveyed to the United States, it left the District of Columbia consisting solely of the territory originally granted by Maryland. As the original conveyance from Maryland was bounded by the low water mark on the Virginia side of the Potomac, it follows that the present District of Columbia is bounded by the same low water mark.

It is respectfully submitted that the judgment of the Court of Appeals should be affirmed.

LOUIS TITUS,
Attorney for Respondent.

FILE COPY

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IN THE

Supreme Court of the United States

October Term, 1930.

No. 678.

Smoot Sand and Gravel Corporation, *Petitioner,*

vs.

Washington Airport, Incorporated, *Respondent.*

Motion of the Commonwealth of Virginia for Leave to File Brief as Amicus Curiæ and Brief of Amicus Curiæ.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1930.

No. 678.

SMOOT SAND AND GRAVEL CORPORATION, *Petitioner,*

vs.

WASHINGTON AIRPORT, INCORPORATED, *Respondent.*

Motion for Leave to File Brief as Amicus Curiæ.

May it please the Court:

The undersigned, as counsel for the Commonwealth of Virginia, respectfully move this Honorable Court for leave to file the accompanying brief in this case as *Amicus Curiæ.*

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EDWIN H. GIBSON,
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Assistant Attorneys General.

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Counsel for Commonwealth of Virginia as Amicus Curiæ.

IN THE

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OCTOBER TERM, 1930.

No. 678.

SMOOT SAND AND GRAVEL CORPORATION, *Petitioner,*

vs.

WASHINGTON AIRPORT, INCORPORATED, *Respondent.*

Brief of Amicus Curiæ.

PRELIMINARY STATEMENT.

The sole question presented in this case is whether the lands lying between high and low water marks on the south side of the Potomac River opposite the District of Columbia are within Virginia or the District of Columbia. The interest of the Commonwealth of Virginia is, therefore, obvious as its own boundary line is involved, together with its right to levy taxes, exercise police jurisdiction and in general exercise its rights of sovereignty within the disputed area.

1.

ORIGINAL BOUNDARY.

From old records, the first royal grant affecting the boundary dispute between Virginia and Maryland is that of May 23, 1609, by which King James of England granted to the Colony of Virginia "All the territory from the point of land called Cape or Point Comfort, all along the seacoast to the Northward two hundred miles." This grant would have embraced all of Maryland and a portion of the territory now within the State of Pennsylvania and would have included the entire width of the Potomac river.

The second grant was that of June 20, 1632, by which Charles I, the son and successor of James, conveyed to Cecilius Calvert the territory embraced in the present State of Maryland, in which the southern boundary is described as "To the farther bank of said river (Potomac) and following it." This grant constituted an overlap. There is no record that the grant to Virginia had been judicially abrogated and, if not, the grant to Virginia, prior in time, should have taken precedence, and the claim of Virginia to all of the territory contained in the grant of James I should have been recognized.

On January 27, 1660, James II granted to Lord Culpeper the territory lying to the south of the Potomac river, now known as the Northern Neck of Virginia. In this grant he included "the Potomac River and all the islands within the outermost banks thereof." This made a second overlap, but only as to the Potomac river, provided, of course, that the King Charles grant conveyed a right to the south shore or, as was afterwards claimed,

to high water mark on the south bank of the Potomac.

These conflicting grants were the cause of claim and counter-claim as to the ownership of the Potomac. Not having been settled previous to the Revolution, Virginia in its Constitution of 1776 receded from its claims to large portions of the territories of Maryland and Pennsylvania, ceded and released all of its claims of property, jurisdiction and government to lands included in those States, but expressly excepted from this renunciation the navigation and use of the Potomac and Pokomoke rivers and the territory of the Virginia *shores* and *strands* bordering on those rivers and all improvements which have been or shall be made thereon. That constitution further provided:—"The western and northern extent of Virginia shall in all other respects stand as fixed by the charter of James the first, in the year one thousand six hundred and nine." * * *. Its Code made the same provisions. It will be noted that in both of these solemn public instruments provision was made for the exception of the operation of Virginia's renuniciation of rights in those territories as to property of the Virginia shore or strands bordering on either of the rivers.

It is undisputed that shores or strands mean the land between low tide and high tide.

Thus, it will be seen that in 1776 Virginia in its Constitution and again in its Code claimed the property of the Virginia shore or strands bordering upon the Potomac river. We are unable to trace the history of the controversy as to the Potomac between Virginia and Maryland during the trying period of the Revolution. However, nine years after Virginia had solemnly reasserted her claim, she and Maryland entered into what all the

courts call a Compact. This Compact of 1785 settled many of the points in controversy between the two States. For the purpose of our argument, we only refer to sections 6 and 7 of this Compact. Section 6 provided as to the navigation of the Potomac, while section 7 provided for property rights of each State on the shores of the Potomac, giving to the citizens of each State full property rights in the shores of that river adjoining their lands with all emoluments and advantages thereto belonging and the privileges of making and carrying out wharves and other improvements. It will be noticed that section 7 speaks three times of shores, the first time speaking of the shores of the Potomac river, and on the other two occasions speaking of the shores of the other *State* and providing that the citizens of neither State shall have a right to fish with nets or seines on the shores of the other State. If the language used means anything, it means that each State owns the adjoining shore on the Potomac river and that the citizens of the other have only limited rights and privileges in those shores. The privilege or right is expressly given to fish in all of the waters and necessarily includes waters covering shores at high tide, but this right of fishing is limited. The right of the citizens of either of the States to fish upon the shore of the other State must be exercised with due regard to the rights of the citizens of that other State and may not be done to the hindrance or disturbance of the fisheries on the shores of the other State. Neither can citizens of one State fish with nets or seines on the shores of the other State. To what possible right could this provision apply other than the land between high water mark and low water mark—the *shore?*

To construe the Compact as intended to acknowledge the right of Maryland to the southern shore of the Potomac while allowing citizens of Maryland unlimited right to fish in the waters of the Potomac with hook and line, and refusing them the right to fish with nets or seines, would have been a most remarkable provision discriminating against the citizens of Maryland, the owner of the shore, in favor of citizens of Virginia, whose citizens would have the right to fish with net and seine on the Virginia shore. Put just a little differently, Maryland and Virginia agreed that Maryland owned a strip of land adjoining the Virginia mainland, between high water mark and low water mark, and at the same time agreed to allow citizens of Virginia unrestricted fishing rights in that strip of Maryland territory, while restricting the rights of the citizens of the owner State. Fishing with hook and line or any other manner of fishing except with nets and seines, Maryland fishermen would ordinarily be using the *waters* of the river without interfering with, going upon, or in any way making use of the land on the Virginia shore, while, if fishermen pursued their calling by fishing with net or seine, they must make physical contact with and use of the land constituting the Virginia shore.

With due regard to ill considered dictum and opinions in cases to which we will hereafter refer, and some of which we will attempt to analyze, it is respectfully submitted that this Compact solemnly entered into by the States of Maryland and Virginia in 1785, six years previous to the cession by these States of territory to the United States, definitely, positively, unqualifiedly and unambiguously settled the rights of each State to its own shores and the rights of citizens of each State to

certain qualified and restricted privileges in the shores of the other State.

A number of cases refer to the boundary of Virginia having been settled by the award of the arbitrators appointed by Maryland and Virginia to settle Potomac river boundary disputes, the award of the arbitrators having been returned January 16, 1877. It is our contention that the boundary was settled by the Compact. The question still at issue was the actual running of the line. Even though there is no question as to the proprietary rights or the fact that the principle by which the line is to be run has been definitely settled, it is not without considerable difficulty that the actual boundary is run and marked upon land. The settlement of the Compact definitely determined where the actual boundary should be run and marked. It could have but little practical effect until a survey was made and the land marked.

Reference is had in a number of cases to the fact that the boundary was not established by the Compact, but that the definite settlement was made later by commissioners appointed by the States of Maryland and Virginia. The commissioners were appointed pursuant to Acts of the General Assemblies of Maryland and Virginia. By the General Assembly of Virginia appointing commissioners, it is declared that the compact theretofore entered into by Maryland and Virginia was to remain obligatory except as it might have been superseded by the provisions of the Constitution of the United States, and it provided that the pact should be faithfully observed and kept by the government of Virginia and all of its citizens, and recited several articles of the Compact, including the seventh article, in which as we have already set forth, the rights of the respective

States to the shores of each State or adjoining each State were acknowledged by each State as the property of the other. So that it will be seen that the very instrument creating the commission to actually locate the boundary between Maryland and Virginia referred to and expressly provided for the maintenance of the original Compact between those States. Under such authority the commissioners or arbitrators were restricted to an observance of the Compact and, the Compact having provided the respective rights of the States in the shores and strands, the commissioners were not authorized to make changes in the Compact, but were only to make a physical survey and mark the boundary line.

Section 14 of the Code of Virginia contains the provisions under which the commission was appointed and it will be noted from a reading of the report of the commissioners that they executed the authority vested in them by having a survey made of the boundary and returning with their report the courses, distances, metes and bounds of this survey. In their report they referred to the fact that measurements were taken and places fixed according to the coast survey and that they had come as near to perfect mathematical accuracy as in the nature of things was possible, and, further, they referred to the fact that the low water mark on the Potomac to which Virginia "has a right to the soil" is to be measured "from low water mark at one head land to low water mark at another without following indentations, bays, creeks, inlets or affluent rivers."

At the date of this report not one of the cases cited by and upon which the appellee relies had been decided and, therefore, the commissioners did not have in mind the many interesting legal questions the courts have since

considered, and, even though Maryland was then claiming the Virginia shores of the Potomac, the commissioners evidently concluded that Virginia was entitled, under the Compact of 1785, to the soil to low water mark on the Potomac. This they agreed had been decided by the two States in 1785. It has been held that the Compact of 1785 did not fix the boundary between the States. If by this is meant that an actual line was not run on the ground, land marks established, trees chopped, stone planted, a plat made with the surveyor's metes and bounds, courses and distances, then we agree no boundary was fixed by the Compact of 1785. If all this is necessary to the establishment of a boundary line, then what, pray, comes of Maryland's boundary line as fixed in King Charles' grant? The Compact fixes the southern boundary of Maryland at low water mark on the Virginia shore of the Potomac. The Maryland grant fixes the southern boundary as the "farther bank of said river (Potomac) and following it." It is said, and *Marine Railway* v. *United States* is quoted, that the Supreme Court of the United States has held that the Compact of 1785 "says nothing about the boundary in terms," although it seems to be generally admitted that the *Maryland Case* held the Compact fixed the boundary at "low water mark." "Low water mark" is fixed in the Compact as some kind of line, for some purpose, in the boundary dispute between Maryland and Virginia. Ordinarily and stript of legal technicalities, the low water mark fixation in the Compact would definitely fix the southern boundary of Maryland and the northern boundary of Virginia at low water mark of the Potomac on the Virginia shore. And if the "reason of the law is the

life of the law," courts should so hold. However this may be, we submit that the language used by King Charles, "To the farther bank of said river (Potomac) and following it" is no more definite and no more fixes Maryland's boundary than the language of the Compact fixing her boundary at "low water mark" on the Virginia shore.

At the time the Virginia-Maryland Compact of 1785 was entered into Maryland and Virginia were soverign States, with full authority to make and enter into boundary line agreements.

It was after the Compact had been entered into on July 16, 1790, that Congress passed an act accepting the territory Maryland and Virginia had offered to cede to the United States, and it was only in 1791 that commissioners were appointed and the ten square miles of territory selected. In the Acts passed by the Maryland and Virginia Legislatures ceding the territory to the United States, it was provided that the United States were not to have any right or property in the soil transferred so as to affect the rights of individuals otherwise than such as were transferred by individual owners to the United States.

On July 9, 1846, Congress passed an act returning to Virginia the land formerly ceded by Virginia to the United States. In the act it was provided that all of the rights and jurisdictions theretofore ceded were ceded and forever relinquished to the State of Virginia in full and absolute right and jurisdiction as well of *soil* as of persons residing thereon. This act of recession gave back to Virginia all that she had given to the Federal government and necessarily included the shores as well as the main land.

2.

BOUNDARY AFFECTED BY COURT DECISIONS.

MORRIS v. UNITED STATES, 174 U. S. 196.

The purpose of the cession of land by Maryland and Virginia to the United States was the establishment of the Federal Capital. By virtue of the cessions by Maryland and Virginia a territory was provided. However, the ownership of the land upon which the city was to be built belonged to private individuals. The government must acquire ownership of the land for its public buildings, for the streets of the proposed city, its parks and playgrounds. Individual owners, by separate conveyances, conveyed or agreed to convey this land in trust upon certain terms and conditions. It was proposed to lay out a Federal city; the streets were to be provided free by the land-owners. A very voluminous description of the process by which the city of Washington was laid out is contained in the *Morris Case*. In the plan of the city, among other streets, Water street was laid out along the shores of the Potomac river. The land on the north was surveyed off into lots, each alternative one of which, or one out of each two of which, was to be sold for the purpose of raising money to finance the public buildings. Each alternative lot was to belong to the land-owner. The land had been acquired from a number of individuals, consequently, the ownership of the lands north of Water street was in different persons. The heirs of John Marshall and of James Markham Marshall claimed certain rights in the shores adjoining the Poto-

mac river, as did a number of parties owning lands north of Water street. In this condition, Congress passed an act authorizing the Attorney General to institute a suit in the Supreme Court of the District of Columbia against all persons claiming any right, title or interest in the land or water in the District of Columbia "within the *limits of the city of Washington or exterior to said limits and in front thereof toward the channel of the Potomac river* * * * for the purpose of establishing and making clear the right of the United States thereto." (Italics ours.) This act expressly limited the court's jurisdiction to the Maryland shore of the District. The claims of the heirs of John Marshall were based upon the ownership of the entire bed of the Potomac river under the James II grant to Lord Culpeper. The James M. Marshall heirs claimed both under the Culpeper grant and the grant of Charles I to Cecilius Calvert. Thus the James M. Marshall heirs' claims were based upon conflicting grants.

Practically all of the other claims asserted were those of riparian rights in the shores of the Potomac in the city of Washington or exterior to said limits, but in front thereof under the Calvert grants.

It will be noted that all of the lands involved in the Morris suit litigation were on the north or Maryland side of the Potomac river. Maryland had ceded this territory to the United States and was no longer interested in the outcome of the litigation. Only the heirs of John Marshall claimed an interest under the Virginia grant and, as Virginia had by its Compact of 1785 with Maryland relinquished its claims to the Maryland shore of the Potomac, she was no longer interested in the outcome of the litigation. Apparently, none of her rights

could by any possibility be affected by the outcome of the litigation.

In this view of the situation involved in the *Morris Case*, we may be mistaken if, as is now claimed, the rights of Virginia have been judicially determined by the dictum of Judge Shiras in that case. There was certainly no necessity for a decision of the Virginia boundary, whether at high or low water mark. The only possible way in which the Virginia boundary could have been remarked upon was because of the fact that the heirs of John Marshall were claiming under the James II grant. The application of that grant only had to do with claims of the Marshall heirs to the Maryland shore in the new city of Washington. Page after page of the *Morris Case* opinion is devoted to the manner in which the United States acquired the Washington city property. The court was of the opinion, and we find no fault with its conclusions, first, that a sovereign State ordinarily owns navigable shores, and, second, that the contract entered into by the riparian proprietors of the Washington city shore conveyed all right, interest and title, including their riparian rights, to the United States; nor do we find fault with the reasoning of the court in its conclusion that the Federal government, after having acquired the entire interest of the landed proprietors, established the city of Washington, its public building sites, its streets and, by necessary implication, retained rights to the shores of the Potomac within the city boundary.

The court also held that there was no evidence that the State of Maryland had ever in any way exercised its right to convey the shore lands to individual proprietors, thus, by implication, holding that the State still held its shore rights at the time it ceded land to the Federal gov-

ernment and that, because of this fact, the title to the Potomac shores within the District of Columbia was the property not of individuals but of the government.

And while practically the same was held (*obiter dictum*) as to the Virginia shores, the court was mistaken as to Virginia legislation, the State having as far back as 1697 passed an act found in 2 Henning's Statutes 456, in which it was provided that every man's right, by virtue of his patent, extended as far as low water mark and that such right was a privilege granted to him by his patent and that no person could go and fish upon his shores above low water mark.

MARINE RAILWAY AND COAL COMPANY v. UNITED STATES, 257 U. S. 47.

In this case the matter in controversy was made land in the Potomac river below low water mark on the Virginia side. While the Court of Appeals of the District of Columbia in the *Evans Case*, 31 Dist. App. 544, holds that the 1785 Compact between Maryland and Virginia was never in force in the District of Columbia, the *Herald Case*, 284 Fed. 927, holds that this same Compact was abrogated by the cession by Virginia of that portion of Virginia which was included in the District of Columbia and that rights which would otherwise have been held by Virginia and its citizens in the Virginia part of the District of Columbia, so far as the Potomac river is concerned, were retained by Congress for the benefit of the District of Columbia upon a recession to Virginia of its contribution to the District of Columbia.

In the *Marine Railway Case* 265 Fed. 437, the Court of Appeals of the District of Columbia recognized the

1785 Compact, quoting section 6 and a part of section 7 thereof and construing the subject matter of the agreement as that of use and jurisdiction and not of sovereignty, and further held that the jurisdiction of the United States within the District of Columbia extends over the Potomac river to high water mark on the Virginia shore. Just how that conclusion is reached, we are unable to understand, in connection with the language of the act of Congress of July 9, 1846, in which it is provided:

> "All of that portion of the District of Columbia ceded to the United States by the State of Virginia and all the *rights* and jurisdiction therewith ceded over the same be and the same are hereby ceded and forever relinquished to the State of Virginia, in full and absolute right and jurisdiction as well of soil as of persons residing or to reside thereon." (Italics supplied.)

The *Evans Case* holds that the recession of Virginia did not apply to the rights of the State or individuals originally settled by the Compact of 1785, because of the fact that the District of Columbia was no party to the settlement between Maryland and Virginia, and, even if it was, that the recession was only of the landed territory of Virginia extending to high water mark in the Potomac river, while the same court and the same justice accepted the Compact in the *Herald Case,* but limited its effect to the use and jurisdiction of the Potomac and to no part of its sovereignty.

The trouble with the opinions of the court of the District of Columbia lies in their apparent failure to take into consideration that part of section 7 of the Compact

which has to do with the Virginia shores of the Potomac. Not only does section 7 give the citizens of Virginia full property in the shores of the Potomac adjoining their lands, but it gives to them all emoluments and advantages and the privileges of building wharves out into the river, and we ask the court to note the language employed in one part giving to citizens of each State property in the shores of the river and in another part giving to such property owners the emoluments and advantages belonging to them as proprietors of such shores with the privilege of building wharves and other improvements within the river itself. The further language used, to the effect that the building of wharves and other improvements in the river is not to obstruct navigation, clearly indicates that the building of these wharves and improvements is not to be confined to shallow water, but to extend out into the river, the only restriction being that such wharves or improvements are not to obstruct the navigation of the river. This same provision which had given the owners of lands adjoining the Potomac full property in the shores of that river may have been construed as a provision limited to individuals and not as applying to the sovereignty of the States, but when we consider that the same section provides that the citizens of neither State shall have a right to fish with nets or seines *on the shores of the other,* it clearly indicates that each of the soverign States recognized the sovereign right of the other to the shores of the Potomac river bordering on that State. In no other possible way can the language of section 7 be reasonably construed.

In the *Evans Case,* Justice Orsdel was of the opinion that the holding in cases cited by him as to the jurisdic-

tion of the District of Columbia on the Virginia side of the Potomac was in no small degree grounded upon the theory that Congress had politically determined the territorial limits of the District of Columbia, and cites an act of Congress approved June 22, 1874, in which the District of Columbia is defined to be "that portion of the territory of the United States ceded by the State of Maryland for the permanent seat of government of the United States including the river Potomac in its course through the District and the islands therein." He says it thus appears that Congress fixed the boundary of the District at high water mark on the Virginia side and that, as this was a political determination of the territorial limits, it is binding upon the courts of the District of Columbia, and quotes from *State* v. *Dunwell,* 3 R. I. 127-128.

The political determination of the *Dunwell Case* applied to the enforcement of the criminal laws of the State enacting such laws within the boundaries as established by the law making authority of the State. By no possibility could the Rhode Island court, or the District of Columbia court, have established the boundary line between the District and Virginia.

In *Rhode Island* v. *Massachusetts,* the jurisdiction of the United States Supreme Court was challenged by Massachusetts on the ground that the boundary dispute between the States was a political and not a judicial question. The court in that case held the question to be judicial and not political. In its opinion, the court did say that prior to the adoption of the Constitution and the establishment of the Supreme Court, the question of boundary between States was political; that after the

adoption of the Constitution they could not by compact determine their boundaries without the consent of Congress, and that where the States failed to agree, the Supreme Court had jurisdiction.

Rhode Island and Massachusetts having agreed by compact, "the construction of such compact is a judicial question, and was so considered by this court in the *Lessee of Sims* v. *Irvine* (3 Dall. 425-454); *Marlatt* v. *Silk and M'Donald* (11 Peters 2, 18); *Barton* v. *Williams,* (3 Wheat, 529-533, and so forth)."

In the *Marlatt Case,* in which the priority of grants to individuals from the States of Pennsylvania and Virginia was in issue, cases from the Supreme Courts of both States were cited. The United States Supreme Court held: "It was laid down in reference to cases arising under, and to be decided by the laws of a State, and then the decisions of that State are looked to to ascertain what that law is; whereas, in the case at bar, the question arises under, and is to be decided by a compact between two States where, therefore, the rule of decision is not to be collected from the decisions of either State, but is one, if we may so speak, of an international character. (11 Peters, 22-23)."

The Supreme Court refused to follow the decision of the Virginia Court in a suit wherein the subject at issue was the application of the Virginia and Pennsylvania compact of 1780, to land grants issued by Virginia in 1779 for lands found by the compact to be within the boundary of the State of Pennsylvania.

The Supreme Court of the United States has repeatedly asserted its jurisdiction in fixing boundary lines between States. *Rhode Island* v. *Massachusetts,* 12

Peters 654; *Virginia* v. *Tennessee,* 148 U. S. 528. *Maryland* v. *West Virginia,* 217 U. S. 577, is one of these cases, and it is noted that the opinion of the court in that case held that the boundary between the States of Maryland and Virginia was fixed at the low water mark on the Virginia shore by the Compact of 1785.

The justice in the *Marine Railway Case,* 265 Fed. 437, 442, says:

> "* * * By the compact of 1785 concurrent jurisdiction on the waters of the Potomac was established between the two sovereignties of Maryland and Virginia. Such compacts are common in this country over the waters of navigable streams. But as to the bed of the river the jurisdiction in the sovereignty to which it belongs is not thereby affected. * * *"

EVANS V. UNITED STATES, 31 D. C. APP. 544;
HERALD V. UNITED STATES, 284 FED. 927.

In these cases appellants were convicted of having, while standing on the Virginia shore, fished in the Potomac river between high tide and low tide. The opinions in both cases in the Court of Appeals of the District of Columbia were delievered by Mr. Justice Van Orsdel, in which he held that the Compact of 1785 between Maryland and Virginia did not apply to the District of Columbia in view of the cessions of land by Virginia and Maryland to the United States and the limited recession of Virginia's contribution to the District of Columbia back to the State of Virginia. The District Court held that, under the grant of Charles I. to Cecilius Calvert, Maryland took to the high water mark on the Virginia

shore, and that, under the law relating to land under navigable waters, the sovereignty of title in the land passed, and that Calvert owned all of the land under the Potomac river including the shores on both sides of the river. Just how this opinion was arrived at is not apparent from the authorities. The original James I. grant had established the southern boundary of Virginia at Cape or Point Comfort and extended it northward two hundred miles. Undoubtedly, the Colony of Virginia would by that grant have extended beyond the Potomac and beyond even the northern boundary of Maryland into the State of Pennsylvania. The grant to Calvert undoubtedly overlapped the grant to Virginia and for a considerable period of time and until Virginia's Constitution of 1776 was adopted the Colony never formally recognized the territorial validity of the Charles I. grant to Calvert so far as it overlapped the James I. grant to Virginia of a territory extending from Cape or Point Comfort two hundred miles northward. The cases undoubtedly ignore the James I. grant and give effect to the Charles I. grant. There is as much apparent reason in law to give effect to the James I. grant and declare it of binding force and effect as there is to give prior effect to the Calvert grant over the James II. grant conveying the Northern Neck of Virginia, including the Potomac river opposite the District of Columbia, to Lord Culpeper. But the courts in the *Evans* and *Herald Cases* have absolutely ignored the grant to James I. and given full effect to that of Charles I. so far as the southern boundary of Maryland was concerned.

In the *Evans Case* the court admitted that citizens of Virginia had certain easements and privileges in the

Potomac river within the boundary of the District of Columbia, under the Compact of 1785, but that those rights were such as were lost by the cession of the land to which they were appurtenant and that, when the Virginia portion of the District was receded, the rights appertaining to citizens owning the Virginia shores of the Potomac were retained by the District.

Maryland v. West Virginia.

This case is cited, analyzed and quoted in the briefs of both appellant and appellee. The issue in the original bill was the western boundary of Maryland. Suit was instituted by Maryland against West Virginia in the Supreme Court of the United States to settle their boundary disputes. It was admitted that the western boundary of Maryland began at the head waters of the Potomac and ran north to the State of Pennsylvania. The States differed as to just where was located the head waters of the Potomac, and the difficulty was to find this location. A line—the Deakins line—had been run by a surveyor of that name in 1787. Deakins established the head waters of the Potomac at Fairfax Stone. This location was not acceptable to Maryland and she and Virginia had been in constant controversy as to this boundary for three-quarters of a century when in 1859 Michener ran a line for Maryland, in which he located the head waters of the Potomac at Potomac Stone, a point west of Fairfax Stone. This left in dispute between Maryland and Virginia the territory between Fairfax Stone and Potomac Stone. The two States not having been able to agree upon a settlement, suit was instituted by Maryland against West Virginia—successor in

title to Virginia—in the Supreme Court of the United States in 1891, in which Maryland asked that her boundary be established, and set up her claim to the territory between the Deakins line and the Michener line. West Virginia, answering the bill in that suit, claimed the territory between these two lines and, in a cross-bill, asked to have what we may call the water boundary between the States established, claiming to the north bank of the Potomac above Harper's Ferry to the Fairfax Stone as the true boundary between the States.

Two opinions were delivered, 217 U. S. 1 and 217 U. S. 577, Justice Day delivering both. In the first decision the court held:

First, that the West Virginia-Maryland boundary began at Fairfax Stone, thus finding in favor of West Virginia:

Second, that the West Virginia-Maryland water boundary was not at high water mark on the north bank of the Potomac, thus finding against West Virginia.

While the finding was against West Virginia upon its claim to the north bank of the Potomac, it did not determine the true boundary between the States, thus it did not undertake to fix the boundary, but left that unsettled.

In the opinion in the first case, Justic Day quoted at some length from Justice Shiras' opinion in the *Morris Case,* and to that extent it may be said that he agreed with the finding in the *Morris Case* and approved the opinion of the court. However, when counsel had prepared decrees, it was found that they differed in their construction of the court's determination, and the issue of the water boundary between Maryland and West Virginia was squarely put in issue before a court of

competent jurisdiction where both parties in interest were before the court.

In the *Morris Case* the issue was not as to the true boundary between the District of Columbia and Virginia, but between the District of Columbia and John Marshall's heirs who claimed the shores of the north bank of the Potomac, the south bank not only not being at issue, but being outside of the jurisdiction of the court in that case, the court at the time acting under express authority of an act of Congress which limited the jurisdiction of the court to claims in the city of Washington and exterior to the limits of the city toward the channel of the Potomac river. Acting under limited authority, and the boundary between the District of Columbia and Virginia not being at issue, the opinion of the court that the southern boundary of Maryland was at high water mark on the Virginia shore of the Potomac was *obiter dictum* in its most extreme form and superlative degree. And, as it is largely upon the authority of this dictum that the *Evans* and the *Herald Cases* were decided, we submit that this court should not feel itself called upon to follow those cases.

The issue in the *Marine Railway Case* was the ownership of made land on the Virginia side of the Potomac below low water mark, so that the boundary was not in issue in that case.

In the *Evans* and *Herald* criminal cases the political jurisdiction and police power of the District were in direct issue, the boundary incidentally and largely immaterial.

Without, in so many words, overruling the *Morris Case*, the *Maryland Case* did so in effect as to the bound-

ary dictum, most likely for the reason that it did not consider the *Morris Case* authority upon the boundary line dispute nor based upon a careful consideration of the Compact of 1785 between the States of Maryland and Virginia.

There are quite a few reasons advanced why the ruling of the *Maryland Case* is inapplicable in this case.

First, the decision was handed down after both Maryland and Virginia had ceded territory to the United States, and the District of Columbia, not being a party, was not bound.

We agree that the District was not a party and is not bound on an issue *res adjudicata*. This reply to the citation of the case as authority to the effect that the Supreme Court has fixed the northern boundary of Virginia at low water mark on the Potomac in a case subsequent to the *Morris Case*, in which that case, to the extent that it fixed a different boundary, overruled the dictum in the *Morris Case*, is most humorous when considered in connection with the impressive, persistent and insistent claim that the *Morris Case* and the *Fish Cases*, to which Virginia was not a party, shall be accepted as a final determination of Virginia's rights.

Second, it is insisted that the last decision in the *Maryland Case* was based upon the report and award of boundary dispute commissioners in 1877, or after the District became a separate sovereignty and, being based upon facts inapplicable, is not even persuasive authority.

On page 5 of appellee's brief, the report of these same commissioners is stated as authority of the conclusive fact that, under the Charles I. grant, the southern boundary of Maryland, was at high water mark on the Virginia shore. Presumably, a most wise commission and a

criticism-proof conclusion. When, further on, the same commission finds that it was established that Virginia, from the earliest period of her history, used the south bank of the Potomac as if the soil to low water mark had been her own, that she did not give up her rights and that, taken altogether, it was established that she had a proprietary right to low water mark on her side to such an extent as to make her claim indisputable, counsel argue that the commission's findings of the facts as they existed in 1785 are erroneous and that no such facts did exist. It is also argued that the court, in the *Maryland Case,* did not fix the boundary, but simply recited the conclusion of the commission and that, even if it did undertake to fix it, it had no right to fix it above Tidewater and, therefore, it is not good authority.

The opinion of the court did quote from the report of the commission. However, the court arrived at its own conclusion, in which it expressly fixed the boundary line, and, as the holding of the court seems to be in dispute, we will quote therefrom at some length (217 U. S. 580):

> "The compact of 1785 (see Code of Virginia, vol. I, title 3, chap. 3, sec. 13, p. 16) is set up in this case, and its binding force is preserved in the draft of the decrees submitted by counsel for both States. We agree with the arbitrators in the opinion above expressed, that the privileges therein reserved respectively to the citizens of the two States on the shores of the Potomac are inconsistent with the claim that the Maryland boundary on the south side of the Potomac river shall extend to high-water mark. There is no evidence that Maryland has claimed any right to make grants on that side of the river, and the privileges reserved to the citizens of the respective States in the compact of 1785, and its subsequent

ratifications, indicate the intention of each State to maintain riparian rights and privileges to its citizens on their own side of the river.

"This conclusion gives to Maryland a uniform southern boundary along Virginia and West Virginia, at low-water mark on the south bank of the Potomac to the intersection of the north and south line between Maryland and West Virginia, established by the decree in this case. This conclusion is also consistent with the previous exercise of political jurisdiction by the States respectively.

"The decree will therefore provide for the south bank of the Potomac river at low-water mark on the West Virginia shore as the true southern boundary line of the State of Maryland."

It is conceded in the opinion in the *Marine Railway Case* in the lower court that the court in the *Maryland Case* held, in effect, that the Compact of 1785 established the boundary line at low water mark on the Virginia shore. The opinion then holds that, unless affected by the exercise of political jurisdiction by the United States, it likewise fixed the boundary of the District of Columbia as ceded by Maryland in 1779, and that whatever territory and right to the soil under the Potomac was ceded to the United States in 1779 by Virginia was receded in 1846. This would seem to have been the opinion of the court in the *Marine Railway Case,* though doubt is thrown upon this conclusion by the court's expression that the subject matter of the Compact was use and jurisdiction and not sovereignty.

We have heretofore discussed the construction of section 7 of the Compact as to this contention.

It is further held the holding in the cases cited, to sustain the claim of district sovereignty, was based in no

small degree upon the determination by Congress of the territorial limits of the district in which its limits were fixed, "including the river Potomac in its course through the District and the islands therein." It is submitted—

First, That the exercise of political sovereignty binds only those States exercising such rights and that the sovereign State of Virginia cannot have its territory taken away by the fiat of some other sovereignty without her consent. If so, Virginia could have acquired both shores of the Potomac by the adoption of her Constitution of 1776, in which instrument she expressly reserved her claims to the shores of that river.

Second, The act of Congress expressly limited the bounds of the District to the territory ceded by Maryland, and the language covering the islands and the Potomac river cannot be construed to enlarge or extend the boundary of the territory ceded.

In the opinion of the Supreme Court of the United States, by Justice Holmes, the court held that the original state of things (Maryland-Virginia boundary) was not changed by the grant of Virginia and the regrant by the United States of the part of the District on the Virginia side, and that the title of Maryland extended at least to low-water mark on the Virginia shore, and that the United States succeeded to the rights of Maryland as of the date of the grant. Both the *Maryland Case* and the *Morris Case* are cited by Justice Holmes as authority for the conclusions drawn in the latter part of the last statement of the findings of the Supreme Court. *Marine Railway Case, supra.*

Justice Holmes says the Compact of 1785 had nothing to do with the case the court was deciding. This we

grant, as it is just what we are contending. The court certainly recognized the riparian rights of citizen owners.

3.

RIGHTS—SERVITUDES—EASEMENTS.

Stress is laid on the fact that the rights of the State of Virginia and of its citizens to the shore of the Potomac river on Virginia's northern boundary line were ceded to the Federal government by that State in 1789. It is practically admitted that the *Maryland* v. *Virginia Case, supra,* as between Maryland and Virginia, fixed the southern boundary of Maryland at the low water mark on the Virginia shore. This decision theoretically fixes the boundary between the States of Maryland and Virginia. At least, it lays down the principle upon which the actual boundary line between the States is to be run. The only subsequent dispute between the States was the actual marking of the line upon the surface of the soil and, as said by the circuit court of appeals, the dispute continued for a considerable length of time and cannot yet be said to be definitely fixed on the ground.

Right much of the argument in brief of counsel for appellant is directed to the question of easements and servitudes. Appellant argues that the rights of Virginia and its citizens, as established by the Compact of 1785, gave to citizens of Virginia no more than an easement in the shores of the river, and that, by the cession to the United States by Virginia and Maryland of the territory comprising the District of Columbia, what may be called the shore rights of Virginia and its citizens

were granted to the Federal District and all shore rights of every kind and description were, by reason of these cessions of territory, absolutely and forever given up and relinquished.

This argument would apply as well to the shore rights of citizens of Maryland as to citizens of Virginia. This contention was not advanced, however, in the *Morris Case,* and it will be noted that the opinion of that case denies riparian rights to the shores on the District side to claimants thereof on account of the fact that such claimants had themselves conveyed their properties to the Federal government for the establishment of the city of Washington, and the city having laid out Water street along the Potomac river, it had thereby cut off the rights of claimants from the Potomac river.

Furthermore, we do not construe the recession of the Virginia territory by the United States as giving to Virginia and her citizens only rights to high water mark on the Virginia shore.

Congress ceded to Virginia all of the *rights* and *jurisdiction* which Virginia had ceded to the Federal government. It will be noticed that this cession particularly provides that the act was not to have the effect of transferring any right or property in the soil otherwise than such as was transferred by individual owners to the United States. By inference, on account of the fact that the *Morris Case* decided against claimants to riparian rights on the Maryland side, because of the fact that they had conveyed those rights away, the court held, if it did not expressly so hold, that the riparian rights of the District were derived by grants from individual owners.

If the District of Columbia did not acquire any of the rights of Virginia citizens by reason of the cession to the United States and individuals owned to low water mark by the provisions of Virginia law at the time of the Virginia cession to the United States, and Congress by its Act of 1846 receded the same rights, then the individual owners still have all such rights as they held at the date of the cession.

CONCLUSION.

The decisions of the courts are not consistent and, even when the results are the same, the reasons advanced are most inconsistent and variable. In the only case—*Maryland* v. *West Virginia*—was the boundary made a direct issue in the pleadings and in that case the court found that the Compact of 1785 fixed the southern boundary at low water mark on the Virginia shore of the Potomac. This case has not been overruled, though the *Marine Railway Case* has thrown what may be termed a suspicion on its findings.

As Virginia has never been a party to any of the cases and has always claimed and never abandoned her contention that the pact of 1785 finally fixed her boundary with Maryland, it is respectfully submitted that this court should definitely recognize the boundary of Virginia at low water mark of the Potomac on her northern shores.

Counsel notice that a brief in this case has been filed for the United States. It seems to have been filed as of right and not by leave of court, nor does the United States appear to have intervened as *amicus curiae*. How-

ever, counsel for Virginia are asking leave to file, if such leave is necessary, as *amicus curiae*.

Respectfully submitted upon behalf of the Commonwealth of Virginia.

JOHN R. SAUNDERS,
Attorney General.
EDWIN H. GIBSON,
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HUGH REID,
Counsel for Commonwealth of Virginia as Amicus Curiæ.

CORRECTED COPY

SUPREME COURT OF THE UNITED STATES.

No. 678.—October Term, 1930.

Smoot Sand and Gravel Corporation, Petitioner, *vs.* Washington Airport, Incorporated.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

[May 4, 1931.]

Mr. Justice Holmes delivered the opinion of the Court.

This suit was brought by the respondent for an injunction against alleged trespasses on land between high and low water mark on the Virginia side of the Potomac River opposite the District of Columbia. It was brought originally in the Circuit Court of Arlington County, Virginia, and on the petition of the defendant the Smoot Sand and Gravel Company was removed to the District Court of the United States for the Eastern District of Virginia. That Court dismissed the case for want of jurisdiction, but the decree was reversed by the Circuit Court of Appeals. 44 F. (2d) 343. A writ of certiorari was granted by this Court.

The Circuit Court of Appeals states that the sole question presented is whether the boundary line between Virginia and the District of Columbia is at high or at low water mark on the Virginia side of the Potomac, and that is the only question argued here. In view of the previous decisions and intimations of this Court it does not need extended discussion now.

It must be assumed, notwithstanding some suggestion of ancient controversies, that the title of Maryland was that conveyed to Lord Baltimore by the charter of Charles I. and ran to and along the farther bank of the Potomac River. *Marine Railway & Coal Co.* v. *United States*, 257 U. S. 47, 63. This means that the boundary was the usual high water mark, *Oklahoma* v. *Texas*, 260 U. S. 606, 626, *et seq.*; so that the only question is whether anything has happened since to change the original line. At the present stage of this old discussion the most important inquiry is raised by the supposed contradiction between the language of this Court in

settling the decree in *Maryland* v. *West Virginia*, 217 U. S. 577, and that in the later case of *Marine Railway & Coal Co.* v. *United States*, 257 U. S. 47. With regard to that it is to be noticed that Mr. Justice Day who wrote the earlier decision took part also in the later and seems to have agreed with it. There was no adequate reason why he should not have agreed. *Maryland* v. *West Virginia* was a suit to settle a portion of the boundary line between those States. The decision could not affect the District of Columbia. It relied primarily upon an arbitration upon the issue in 1877, in which it was admitted that the original boundary was high water mark on the Virginia side, but held that the low water mark was established by prescription. The arbitration also relied upon a Compact of 1785, 1 Dorsey, Maryland Laws, 1692-1839, p. 187; 12 Hening, Virginia Statutes, p. 50, giving it a construction to which we cannot agree. Prescription was a sufficient reason for the decision, and could not be invoked against the District. The Compact is seen in a different light in *Marine Railway & Coal Co.* v. *United States*. As stated in 257 U. S. 64, Article 7 gave the citizens of each State full property in the shores of the River adjoining their lands and the privilege of carrying out wharves, &c., but left the question of boundary open to long continued disputes. The rights of private citizens established by Article 7 and further cared for by Article 12 giving citizens of each State having lands in the other liberty to transport to their own State the produce of such lands or to remove their effects, free of any charge or tax. But private ownership does not affect State boundaries. Some argument is based on the word 'shores'. But that is merely a topographical indication and imports nothing as to the sovereignty over them. We adhere to the opinion that the Compact has no bearing on the present case.

Decree reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

SUPREME COURT OF THE UNITED STATES.

No. 678.—October Term, 1930.

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[May 4, 1931.]

Separate opinion of Mr. Justice McReynolds.

Twenty years ago (1910), in *Maryland* v. *West Virginia*, 217 U. S. 577, it was definitely ruled by this Court (and rightly so) that under the compact of 1785 between Virginia and Maryland the uniform southern boundary of the latter State was low water mark on the right bank of the Potomac. Proper solution of the present controversy depends upon the precise question there decided. Fair consistency and proper regard for titles along the ten-mile river front in the District of Columbia, I think, demand that we follow what was thus solemnly declared.

Marine Ry. Co. v. *United States* (1921), 257 U. S. 47, was a proceeding begun by them to recover land on the Potomac River front at Alexandria originally below low water mark. Notwithstanding, the essential point there was distinct from the one upon which *Maryland* v. *West Virginia* turned, the opinion carefully affirmed that "the former decisions of the Court must be followed so far as they go"—a truism, I submit, still worthy of acceptation. And the further observation that "the compact between Virginia and Maryland in 1785 also seems to us to have no bearing upon the case" is plainly correct, whether relevant or not.

As *Marine Ry. Co.* v. *United States* related only to land below low water mark the compact of 1785 of course was inapplicable to the controversy. That compact did not undertake to settle titles to lands so located. No more, did it apply to lands in Baltimore City.

In such circumstances the suggestion that the writer of the opinion in *Maryland* v. *West Virginia* by assenting to *Marine Ry.*

Co. v. *United States* gave his approval to a doctrine directly opposed to the one he had definitely expressed for the Court seems to me without substance. The Court, through him, had ruled that the Maryland boundary extended to low water mark on the south side. Why should he object to an opinion which after expressly accepting former decisions held that land lying in the river north of that line had been part of Maryland?

The challenged decree should be affirmed.